Dlubak Corporation *and* Aluminum, Brick and Glass Workers International Union, AFL–CIO–CLC. Cases 6–CA–21319, 6–CA–21538, 6–CA–21570, and 6–RC–10106

July 6, 1992

DECISION, ORDER, AND DIRECTION

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND OVIATT

On September 25, 1991, Administrative Law Judge William A. Pope II issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief and a motion to strike Respondent's exceptions in part. The Charging Party filed a response to the Respondent's brief in support of exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order as modified.[3]

AMENDED CONCLUSIONS OF LAW

1. Substitute the following for Conclusion of Law 3.

''3. By disparaging employees who joined, supported, and or assisted the Union; threatening employees with plant closure if they chose the Union as their collective-bargaining representative; coercively interrogating employees about their union activities and the union activities of other employees; threatening employees that bargaining would begin at zero if they chose a union as their collective-bargaining representative; issuing a notice restricting the movement of employees within the plant because of their union activities; threatening employees with reduction in wages and benefits, loss of jobs, discharge or layoff, or with other unspecified reprisals because of their union activities; threatening that employees on layoff would not be recalled because of their union activities; threatening employees with the inevitability of strikes if they chose a union as their collective-bargaining representative; and creating the impression among employees that their union activities were under surveillance, Respondent violated Section 8(a)(1) of the Act.''

2. Substitute the following for Conclusion of Law 6.

''6. Since November 20, 1988, the Union has been the exclusive bargaining agent, within the meaning of Section 9(a) of the Act, representing a majority of the employees in the following appropriate unit:

> All full-time and regular part-time production and maintenance employees employed by the Respondent at its Freeport, Pennsylvania, and Kittanning, Pennsylvania facilities; excluding casual employees, office clerical employees and guards, professional employees and supervisors as defined in the Act.''

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Dlubak Corporation, Freeport, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(c).

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[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The General Counsel has filed a motion to strike the Respondent's exceptions in part because they do not comply with Sec. 102.46 of the Board's Rules and Regulations. We deny the motion to strike.

In finding that the bonuses given to employees were unlawful, Member Devaney finds it unnecessary to rely on *B & D Plastics*, 302 NLRB 245 (1991), which was cited by the judge.

[2] In excepting to the judge's finding that three employees did not validly revoke their signed authorization cards, the Respondent relies on, inter alia, *Struthers-Dunn, Inc. v. NLRB*, 574 F.2d 796 (3d Cir. 1978). We find that case distinguishable. In *Struthers-Dunn*, the revocations occurred ''before any unfair labor practice was committed'' and were ''free and voluntary expressions of choice, uninfluenced by any activity by the employer.'' Id. at 801. By contrast, in the instant case, the judge found, and we agree, that the attempted revocations ''were the product of Respondent's unfair labor practices.'' We find no merit in the Respondent's argument, on exceptions, that the closeness in time of the card signing and the expressions of intent to revoke shows that the three employees' initial decision to sign the cards was not deliberate or that the Respondent's unfair labor practices played no role in the attempted revocations. In our view, the most likely inference is that the employees' willingness to sign cards that clearly stated their support for the Union, and thereby to risk inviting the fate of those already discriminatorily discharged or laid off, waned on reflection about possible unlawful consequences.

In agreeing with the judge that the Union had majority support on November 20, 1988, we find it unnecessary to pass on whether or not Janet Toy's card should be counted. Without Toy's card, the Union had 37 cards, a majority in the unit which numbered 73 on November 20. We also find it unnecessary to rely on the judge's findings with respect to manifestations of support for, or opposition to, the Union thereafter.

We agree with the judge that a bargaining order to remedy the Respondent's misconduct is warranted under *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). However, we find it unnecessary to pass on the judge's determination that this case falls into the first category of cases identified there by the Supreme Court. The Respondent's conduct clearly falls at least into the second category of cases under *Gissel* and meets the Gissel standards for issuance of a bargaining order for that category.

[3] We shall amend the judge's Conclusions of Law and modify his recommended Order to conform to his findings. We shall also substitute a new notice to employees.

''(c) Interrogating employees about their own union activities and those of other employees, and disparaging employees who join, support, or assist a union.''

2. Substitute the following for paragraph 1(d).

''(d) Threatening employees with a reduction in wages and benefits, loss of jobs, discharge, layoff, failure to recall from layoff, closure of the Respondent's plants, and other unspecified reprisals if the employees select a union as their collective-bargaining representative, or because they engage in union activities.''

3. Add the following as paragraph 2(f).

''(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.''

4. Substitute the attached notice for that of the administrative law judge.

DIRECTION

IT IS DIRECTED that the Regional Director for Region 6 shall, within 14 days from the date of this Decision, Order and Direction, open and count the ballot of William Plunkard. The Regional Director shall then serve on the parties a revised tally of ballots.

If the revised tally shows that the Union has received a majority of the valid ballots cast, the Regional Director shall issue a certification of representative. If the revised tally shows that the Union has not received a majority of the valid ballots cast, the Regional Director shall set aside the election and dismiss the representation case.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
>
> To form, join, or assist any union
>
> To bargain collectively through representatives of their own choice
>
> To act together for other mutual aid or protection
>
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT create the impression that your union activities are under surveillance.

WE WILL NOT pay bonuses to you in order to discourage you from supporting the Aluminum, Brick and Glass Workers International Union, AFL–CIO–CLC or without bargaining with the Union as the exclusive collective-bargaining representative of our unit employees.

WE WILL NOT question you about your union activities or about the union activities of your fellow employees.

WE WILL NOT disparage employees who join, support, or assist a union.

WE WILL NOT threaten you with plant closure in order to discourage you from engaging in union activities.

WE WILL NOT threaten you with reduction in wages and benefits, loss of jobs, discharge, layoff, or other reprisals in order to discourage you from engaging in union activities.

WE WILL NOT threaten that you will not be recalled from layoff because of your union activities.

WE WILL NOT discharge you or lay you off or refuse to recall you from layoff because you engage in union activities.

WE WILL NOT restrict your movement within the plant because you engage in union activities.

WE WILL NOT threaten you with inevitability of strikes if the employees choose a union to be their collective-bargaining representative.

WE WILL NOT threaten you that bargaining will begin at zero if the employees choose a union to be their collective-bargaining representative.

WE WILL NOT transfer you from one of our plants to the other because of your union activities.

WE WILL NOT issue written warnings to you for engaging in union activities.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer William Plunkard, Brion Smith, Mark Kijowski, Kevin Dosch, Nick Kuchta, Jeffrey Copeland, Ron Vantine, and Mark Gorog immediate and full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed and WE WILL make them whole for any losses they have incurred as a result of the discrimination against them, plus interest.

WE WILL remove from our files any reference to the unlawful discharge of William Plunkard, the unlawful layoffs of Brion Smith, Mark Kijowski, Kevin Dosch, Nick Kuchta, Jeffrey Copeland, Ron Vantine, and Mark Gorog, the unlawful written warning issued to Bruce Offredi, and the unlawful transfer of Tracy Reuter, and notify them in writing that this had been done and that the discharge, layoffs, written warning, and transfer will not be used against them in any way.

WE WILL, on request, bargain with the Aluminum, Brick and Glass Workers International Union, AFL–CIO–CLC as the exclusive representative of the em-

ployees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time production and maintenance employees employed by the Respondent at its Freeport, Pennsylvania, and Kittanning, Pennsylvania facilities; excluding casual employees, office clerical employees and guards, professional employees and supervisors as defined in the Act.

DLUBAK CORPORATION

Suzanne C. McGinnis, Esq. and *Sandra Beck Levine, Esq.*, for the General Counsel.
E. Donald Ladov, Esq., of Pittsburgh, Pennsylvania, for the Respondent.
R. Michael LaBelle, Esq., of Washington, D.C., for the Charging Party.

DECISION

WILLIAM A. POPE II, Administrative Law Judge. In a consolidated amended complaint,[1] dated April 25, 1989, the Regional Director of Region 6 of the National Labor Relations Board alleges that the Respondent violated Section 8(a)(1) of the National Labor Relations Act by disparaging, shoving, threatening, interrogating, and terminating employees because they joined, supported or assisted a union; that the Respondent violated Section 8(a)(1) and (3) of the Act by terminating, laying off, and failing to recall employees, and by granting bonuses of $500 and $50, and by issuing written warnings and transferring employees, all because of their union activities and in order to discourage employees from engaging in union activities; and that Respondent violated Section 8(a)(1) and (5) of the Act by failing and refusing to recognize and bargain with the Union; by unilaterally granting its employees the $50 bonus; and by transferring an employee. Consolidated for hearing is the Regional Director's order directing hearing on objections and challenged ballots concerning an election by secret ballot conducted on January 12, 1989, pursuant to a Stipulated Election Agreement approved on November 17, 1988. The original charge in Case 6–CA–21319 was filed on October 12, 1988; an amended charge in Case 6–CA–21319 was filed on December 19, 1988; the original charge in Case 6–CA–21538 was filed on January 18, 1989; the original charge in Case 6–CA–21570 was filed on February 2, 1989; amended charges in Cases 6–CA–21570 and 6–CA–21538 were filed on March 23, 1989; objections to conduct affecting the election were filed by the Petitioner in Case 6–RC–1016 on January 19, 1989; and, objections to election were filed by the Employer on January 19, 1989. Trial was held before Administrative Law Judge William A. Pope II, on May 22 through 26, 1989, August 21 through 24, 1989, and September 18 through 21, 1989, in Kittanning, Pennsylvania, and on October 11, 1989, in New Kensington, Pennsylvania.

Background

Dlubak Corporation is a closely held business engaged in manufacturing curved glass for architectural applications, display cases, and for use in the transportation industry. The Company also manufactures deco glass, engraved glass, and specialty glass. Roughly 80 percent of its business is glass bending, a process involving building molds and bending glass to customers' specifications; 20 percent is aluminum bending, which involves bending aluminum extrusions, for use as glass frames, to customers' specifications. It operates two manufacturing facilities, plant 1, its main plant, located in Freeport, Pennsylvania, and a smaller plant, plant 2, at which only glass bending is performed, located in West Kittanning, Pennsylvania.

All the stock of Dlubak Corporation is held by Frank Dlubak and his wife. Frank Dlubak is the Company's president, and heads its marketing activities. David Bazzano is the Company's chief executive officer, and is responsible for its day-to-day operations, as well as its personnel and labor relations policies and decisions. He is a member of a three-person management group which also includes David Passarelli, vice president of technology, and Brian Henry, vice president of finance.

Functionally, the Company's operations are broken down into glass and aluminum divisions. Functions performed in the glass division include glass cutting, glass bending, glass lamination, construction of pans or molds (made in the pan shop) used to bend glass, boxing, and shipping. Functions performed in the aluminum division include setting up bends, bending aluminum frames to customers' specifications, and inspection and shipping of the finished bends. In addition to production employees working in the glass and aluminum divisions, Dlubak Corporation also employs, among others, inspection personnel, maintenance personnel, accounting and clerical personnel, sales representatives, and customer service representatives. During the period of time at issue in this case, from October 1988 to March 1989, Dlubak Corporation appears to have employed a work force of from 90 to 100 persons. Its payroll for February 3, 1989, shows 92 active paid employees, and 5 active employees not paid.

Dlubak Corporation normally operated three production shifts in the glass and aluminum divisions.[2] Production employees, working under crew chiefs, were assigned to rotating shifts: the daylight shift from 7 a.m. to 3 p.m., the after-

[1] The complaint in Case 6–CA–21319 was issued on December 20, 1988. An order consolidating Cases 6–CA–21538 and 6–CA–21570 was issued on March 24, 1989. An order directing hearing on objections and challenged ballots and notice of hearing was issued in Case 6–RC–10106 on March 28, 1989. An order further consolidating cases was issued in Cases 6–CA–21319, 6–CA–21538, 6–CA–21570, and 6–RC–10106 on March 28, 1989. A consolidated amended complaint and notice of hearing was issued in Cases 6–CA–21319, 6–CA–21538, 6–CA–21570, and 6–RC–10106 on April 25, 1989. The consolidated amended complaint was further amended at the hearing on May 22, 1989, to delete subparagraph (b) of paragraph 11; to add the words, ''On or about January 9, 1989'' to subparagraph (d) of paragraph 14; and to change subparagraph (b) of paragraph 13 to read, ''on or about January 9, 1989, threatened its employees with inevitability of strike if the Union came in.''

[2] The glass division's pan shop apparently normally operated with two shifts.

noon shift from 3 to 11 p.m., and the night shift from 11 p.m. to 7 a.m.

From July 1988 to April 1989, Benjamin M. Claypool was the Company's production manager, or plant manager, supervising both glass and aluminum bending operations. The supervisor of the glass lamination department was Martha (Marti) Patton. The parties stipulated that Dan Porter is also a supervisor.[3]

In late September 1988, the Aluminum, Brick and Glass Workers International Union (the Charging Party) began an organizational campaign at the Dlubak Corporation. The Union's International representative assigned to the campaign was John E. Shinn. His first meeting with employees of Dlubak Corporation occurred on September 30, 1988.

On October 24, 1988, the Union filed a petition[4] for certification as representative of all of Dlubak Corporation's production and maintenance employees for collective-bargaining purposes.[5] On November 14, 1988, the parties entered into a Stipulated Election Agreement providing for a secret-ballot election to be held under the supervision of the Regional Director of Region 6 of the National Labor Relations Board at agreed-on times of day on January 12, 1989. An election was held on the the agreed day.

Issues

a. *Complaint*. The consolidated amended complaint, as further amended during the hearing, alleges that Dlubak Corporation committed numerous violations of Section 8(a)(1), (3), and (5) of the Act during the period from on or about October 6, 1988, and, with regard to some of the alleged violations, continuing to the present.

The 8(a)(1) violations include disparaging employees who joined, supported, and/or assisted the Union; physically accosting employees because they joined, supported, and/or assisted the Union; threatening employees with plant closure if they chose the Union as their collective-bargaining representative; interrogating employees regarding their union membership, activities, and sympathies, and the union membership, activities, and sympathies of their fellow employees; threatening employees that bargaining over wages and benefits would begin from zero if the employees chose the Union as their collective-bargaining representative; issuing a notice restricting the movement of its employees in the plant; threatening employees with layoffs and other unspecified reprisals if they chose the Union as their collective-bargaining representative; threatening that employees on layoff would not be recalled; threatening employees with the inevitability of strikes, because they joined, supported, or assisted the Union; and creating the impression among employees that their union activities were under surveillance.

The 8(a)(1) and (3) violations, all allegedly committed because the employees engaged in concerted activities for the purpose of collective bargaining or other mutual aid or protection, include discharging employee William Plunkard; laying off employees Brion Smith, Mark Kijowski, Kevin Dosch, Nick Kuchta, Jeffrey Copeland, Ron Vantine, and Mark Gorog; failing and refusing to recall its employees Brion Smith and Kevin Dosch, and failing and refusing to recall employee Mark Kijowski until January 14, 1989; giving its employees a bonus of $500; issuing a written warning to employee Bruce Offredi; giving its employees a $50 bonus (also alleged to be a violation Section 8(a)(5)); and transferring employee Tracy Reuter from its Freeport facility to its Kittanning, Pennsylvania facility (also alleged to be a violation of Section 8(a)(5)).

The 8(a)(1) and (5) violations include refusing to recognize or bargain with the Union, as the exclusive collective-bargaining representative of the unit, on matters relating to wages, hours, and other terms and conditions of employment which are mandatory subjects for the purpose of collective bargaining.[6]

The complaint further alleges that since on or about November 20, 1988, and/or by March 14, 1989, a majority of Respondents employees in the designated unit selected the Union as their representative for collective-bargaining purposes, and that because unfair labor practices committed by Respondent are so serious and substantial in character that the chances of conducting a fair rerun election are slight, issuance of a bargaining order, rather than reliance upon traditional remedies, is appropriate.

Consolidated for hearing with the complaint are objections to the election filed by the Charging Party and the Respondent, and challenges to the ballots of Mark Livengood, Richard Anthony, William Plunkard, Timothy Ballas, Fred Ruppersberger, Kathy Claypool, Nancy Noroski, and Barbara Fratta.

b. *Answer*. In its answer to the consolidated amended complaint, the Respondent admitted:

> (1) Filing and service of the charges;
>
> (2) jurisdictional facts;
>
> (3) that the Union is a labor organization within the meaning of Section 2(2), (6), and (7) of the Act;
>
> (4) that Frank Dlubak (owner), David S. Bazzano (chief executive officer), Benjamin M. Claypool (plant manager), and Marty Patton (supervisor) are supervisors and agents of Respondent within the meaning of Section 2(11) and 2(13) of the Act;
>
> (5) that on or about October 6, 1988, it discharged and has refused to reinstate its employee, William Plunkard;
>
> (6) that on or about October 7, 1988, it laid off its employees Brion Smith, Mark Kijowski, Kevin Dosch, Nick Kuchta, Jeffrey Copeland, Ron Vantine, and Mark Gorog;
>
> (7) that since October 7, 1988, it has failed and refused to recall its employees Brion Smith and Kevin Dosch, and, from on or about October 7, 1988, to on or about January 14, 1989, failed and refused to recall its employee Mark Kijowski;

[3] Testimony established that Porter is a supervisor in the glass division of the Company.

[4] The Union first requested recognition as bargaining representative on October 21, 1988.

[5] Excluded from the bargaining unit were office clerical employees, guards, and professional employees, and supervisors, as defined in the Act.

[6] The transfer of Tracy Reuter and granting of a $50 bonus on February 16, 1989, are alleged to be mandatory subjects of bargaining, and, by failing to bargain with the Union concerning these matters, Respondent is alleged to have violated Sec. 8(a)(5), as well as Sec. 8(a)(1) and (3).

(8) that on or about October 13, 1988, it granted a bonus of $500 to its employees;

(9) that on or about November 9, 1988, it issued a written warning its employee Bruce Offredi;

(10) that on or about February 16, 1988, it gave its employees a $50 bonus;

(11) that on or about February 27, 1989, it transferred its employee, Tracy Reuter, from its Freeport, Pennsylvania, facility to its Kittanning, Pennsylvania, facility;

(12) that its following employees constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time production and maintenance employees employed by the Respondent at its Freeport, Pennsylvania, and Kittanning, Pennsylvania, facilities; excluding casual employees, office clerical employees and guards, professional employees and supervisors as defined in the Act;

(13) that since on or about November 20, 1988, it has failed and refused to recognize or bargain with the Union as the exclusive collective bargaining representative of the Unit; and

(14) that the bonus of $50 and the transfer of Tracy Reuter are mandatory subjects for the purpose of collective bargaining, and that it granted the bonus of $50 and transferred Tracy Reuter without prior notice to the Union and without affording the Union an opportunity to negotiate and bargain as the exclusive bargaining representative of its employees.

c. *Issues*. The results of the election held on January 12, 1989, were as follows: (1) approximate number of eligible voters—75; (2) void ballots—0; (3) votes cast for the Petitioner—33; (4) votes cast against participating labor organization—33; (5) valid votes counted—66; (6) challenged ballots—8; (7) challenges are sufficient in number to affect the results of the election. Both the Union and the Employer filed timely objections to the election. The Employer challenged the ballots of Mark Livengood, Richard Anthony, and William Plunkard, on the ground they were terminated prior to the election. The Union challenged the ballots Timothy Ballas and Fred Ruppersberger on the ground they are supervisors within the meaning of the Act, and the ballots of Kathy Claypool, Nancy Noroski, and Barbara Fratta, on the ground they are office clerical employees.

Both the Respondent and the Union filed objections to the election, and requested that the election be set aside. Respondent argues that if the Union obtains a majority vote as a result of the determination of the challenged ballots, ''then (and only then), should the election be set aside and rendered null and void. As set out in the Regional Director's March 28, 1989 order directing hearing on objections and challenged ballots and notice of hearing, the Respondent's (the Employer's) objections, dated January 19, 1989, allege:

> 1. The Aluminum Brick and Glass Workers Union (hereinafter, ''Union'') its agents and representatives, interfered with the election rendering it impossible for the employees to make a rational and uncoerced election.
>
> 2. The Union, its agents and representatives, discriminated against and belittled certain female employees.
>
> 3. The Union, its agents and representatives, threatened and coerced certain employees with threats of physical violence in reprisal for voting ''no.''
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> 4. The Union, its agents and representatives, misrepresented that certain employees would be terminated if the Union lost the election.
>
> 5. The Union, its agents and representatives, made other misrepresentations; vandalized company and adjacent property, otherwise made inflammatory, irrelevant and/or discriminatory appeals to employees; threatened and/or practiced physical violence; and otherwise improperly and adversely affected the elections result.
>
> 6. The Union, its agents and representatives, disseminated literature and made campaign speeches on company property and at other locations within the 24 hour period before the election.
>
> 7. Third parties improperly acted and spoke as to affect the outcome of the NLRB election adversely to the employer.

The Union's objections, dated January 18, 1989, as set out in the Regional Director's order of March 28, 1989, allege that the Employer engaged in the following acts of misconduct for which the election should be set aside:

> 1. Threatened employees with plant closure if they voted for the Union.
>
> 2. Threatened employees with job loss because of activities on behalf of Union.
>
> 3. Interrogated employees concerning their Union sympathy and activity.
>
> 4. Ordered employees not to wear Union T-shirts and threatened them for doing so.
>
> 5. Disciplined employees for writing ''solidarity'' on hard hats with history of employees writing slogans on hard hats without being disciplined.
>
> 6. Gave pay raises to selected employees as inducement to vote against the Union.
>
> 7. Generally intimidated employees against supporting or voting for Union.

The Respondent offered no evidence, and there is none in the record of the proceeding in this case, to support the allegations of union misconduct contained in its objections, other than some evidence on the question of whether union solicitors misrepresented the purpose of union authorization cards. That allegation will be considered in the context of the General Counsel's complaint, and will not be discussed separately. Otherwise, the Respondent's objections are dismissed for lack of evidence.

The issues raised in the objections filed by the Union are encompassed in the amended consolidated complaint, and likewise will not be considered separately.

At the hearing, the parties stipulated that Mark Livengood and Richard Anthony were terminated before the election, and that Respondent's challenge to their ballots should be sustained, and their ballots should not be counted. The remaining challenged ballots are those of William Plunkard, Timothy Ballas, Fred Ruppersberger, Kathy Claypool, Nancy Noroski, and Barbara Fratta.

In light of Respondent's answers to the complaint, the issues remaining in contention, in addition to the issue of the challenged ballots, are: (1) Did the Respondent commit unfair labor practices by: disparaging employees; physically accosting employees; threatening employees with plant closure; interrogating employees about their union sympathies and activities, and those of coworkers; threatening employees that bargaining over wages and benefits would begin at zero if they chose the Union as their collective-bargaining representative; threatening employees with unspecified reprisals; laying off employees; refusing to recall employees on layoff; terminating an employee; threatening employees with layoff or termination; creating the impression of surveillance; issuing a notice restricting movement of employees in the plant; issuing a written warning to an employee; transferring an employee; threatening that a strike would be inevitable; paying the employees bonuses of $500 and $50; and refusing to recognize or bargain with the Union as the exclusive bargaining representative of the unit on matters relating to wages, hours, and other terms and conditions of employment which are mandatory subjects for the purpose of collective bargaining, including the transfer of Tracy Reuter and granting of a $50 bonus on February 16, 1989, all because employees joined, supported, and/or assisted the Union; (2) are the Union and the Employer bound by a preelection stipulation into which they entered concerning the size and membership of the bargaining unit; (3) did the Union obtain authorization cards from a majority of the bargaining unit, before, or after, the election; and (4) assuming that some or all of the alleged unfair labor practices are established, should the appropriate remedy be a bargaining order?

In its posthearing brief, Respondent conceded the likelihood that the election should be set aside because of the 8(a)(1) conduct alleged in the complaint, and, in particular, because of its decision not to have Frank Dlubak, the Company's president and director of marketing activities, who, together with his wife, owns 100 percent of the Company's stock, take the witness stand to rebut statements attributed to him. As stated in Respondent's brief, at page 60:

> In light of the numerous Section 8(a)(1) conduct alleged in the Consolidated Complaint to have occurred during critical period before the election, and noting particularly the Employer's decision not to have Mr. Dlubak take the witness stand to rebut statements attributed to him, the Employer realizes that it is extremely unlikely that the election will not be set aside. Clearly, if this case could have been settled by setting aside the election, it would have been done. As it is, the significance of the case is the request for a bargaining order remedy. Accordingly, no further argument will be made against setting the election aside.

As framed by the Respondent, therefore, the issue in this case is not whether the election should be set aside because of unfair labor practices committed by Respondent in the 4-month period preceding the election, the Respondent virtually concedes that it should, but whether that misconduct was so egregious as to warrant issuance of a bargaining order.

FINDINGS AND CONCLUSIONS

I.

a. *8(a)(1) violations by Frank Dlubak*. This case is one in which the Employer was, and remains, adamantly opposed to selection by its employees of a union as their representative for collective-bargaining purposes. The Respondent vigorously opposed the Union's organizational campaign by distributing to its employees, on at least 14 occasions between November 9, 1988, and April 13, 1989, by mail, notice postings, and paycheck stuffers, various written material intended to express opposition to the Union by Dlubak Corporation.

The tone of the Employer's campaign in opposition to the Union was set by its president, and coowner, Frank Dlubak. Dlubak made it clear to his employees that loyal members of the ''Dlubak Team'' were those employees opposed to the the Union. He equated support for the Union with disloyalty.

In a conversation with employees Rena Bellotti, J. J. Walker, and Dirk Fennell[7] in mid-October 1988, Frank Dlubak said, ''I don't know why they want a union here, other plants have had unions and they shut down. As a matter of fact, PPG in Ford City wants me to buy them out.''[8] Substantially the same account of this conversation was given by witnesses Rena Bellotti, J. J. Walker, and Dirk Fennell. Implicit in these remarks was a threat by Dlubak to close his plant if the employees selected a union to be their collective-bargaining representative, as had happened at other unspecified plants, or sell his plant, as in the case of PPG. In effect, Dlubak told his employees that what had happened to employees at other plants who chose a union could happen to them, too.

Robert L. Bowser, an employee of the aluminum department who was laid off on October 7, 1988, and recalled on October 10, 1988,[9] had a conversation with Frank Dlubak several days after being recalled, in which Bowser said that he was a union supporter, and did not think a Union would hurt Dlubak. Dlubak agreed that the union would not hurt him, but said that there was no law saying he had to operate the plant there. Referring to Plant Manager Ben Claypool, Dlubak said that he knew every move that Claypool made. Implicit in Dlubak's remarks was a threat to move his plant elsewhere if his employees chose a union to represent him.

Dlubak, by stating he was aware of Production Manager Benjamin Claypool's ''move[s],'' implicitly approved of them. Implicitly, therefore, Dlubak told his employees that he approved of violations of the Act by Claypool. Violations of the Act by Claypool are discussed infra.

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[7] Rena Bellotti, an employee of Dlubak Corporation for approximately 2 years, is a laminator insulator in the lamination department. J. J. Walker, an employee of Dlubak Corporation for over 4 years, is a laborer in the lamination department. Dirk Fennell, an employee of Dlubak Corporation since September 1987, also works in the lamination department.

[8] Rena Bellotti identified PPG as a unionized employer. Ford City, Pennsylvania, is a community near Kittanning and Freeport, Pennsylvania.

[9] Bowser was no longer an active employee of Dlubak Corporation at the time he testified. The General Counsel does not allege that his employment was terminated in a manner evidencing any bias by the Respondent.

On December 11, 1988, Dlubak asked employees Frank Cushey[10] and Mike Bauer if they had received the union literature which employees Mark Kijowski, Kevin Dosch, and Brion Smith had been passing out the previous Thursday.[11] Cushey acknowledged that he had. Cushey related that after that, Dlubak said, ''You know, unions are no good, all they do is drag down companies.'' Referring to employees Kijowski, Dosch, and Smith, Dlubak said, ''They were nothing but lazy, misfit, rejects from the glass department.'' Cushey testified that Dlubak went on to say, in substance, if they think they were going to bring a union in here and destroy what took him this long to build, somebody will get hurt. Dlubak said, ''They've never seen me when I was mad.'' Dlubak told Cushey that a friend of his had heard employee Kevin Dosch telling someone in a local bar that as soon as the Union got in, they would shut the place down. Referring to that remark which he attributed to Dosch, Dlubak said, ''See, by bringing in the union, they shut the place down, we'll all be out of work.'' Cushey testified that he repeated Dlubak's statements to other glass department employees, including Dave Plunkard, Jim Hudek, Jim Walker, Doug Leipertz, Brad Kuhn, and Jim Cravener.

Dlubak's remarks to his employees on December 11, 1988, are permeated with direct and oblique threats of loss of jobs and plant closure if the employees selected a union, and disparaging remarks about unions, in general, and three union supporters among Dlubak's employees, in particular. He threatened retaliation, and injury, of an unspecified nature, to anyone trying to destroy his company, as by supporting a union, and implied that he had friends who were surveilling his employees' union activities away from the plant.

In November 1988, Frank Dlubak told witness Donald L. Snyder,[12] father of Dlubak employee, Jeffrey Snyder, ''you should talk to your son, because he is going against us.'' Donald L. Snyder testified that he told his son about the incident. Not only was Dlubak's remark threatening towards Snyder, because he supported the Union, and was not one of Dlubak's team, but implicit was the suggestion that Dlubak had his employees under surveillance and knew about their union activities.

In December 1988, Frank Dlubak spoke to Crew Chief Jeffrey Snyder,[13] in the presence of employee Jim Mitchell. Dlubak said that he had come to the aluminum shop especially to talk to Snyder. Snyder said that he wanted to explain to Dlubak that wearing a union pin would not change the way he worked, he had been hired to do a job and would continue to do that job. Dlubak agreed that Snyder had been doing his job, and would continue to do it, then went on to say, ''I don't want a union in here and I will not have a union in here.'' Dlubak said a union would not hurt him, but he had made the place what it is today and would not want nor would he have a union.

During his December 1988 conversation with Jeffrey Snyder, Dlubak referred to employee Brion Smith, saying that he was not there, and that he had given Smith a lot of breaks when he missed work while going through a divorce.[14] Dlubak also stated that Bill Plunkard was not there; he had refused to do his paperwork, and that was an automatic dismissal.[15] Dlubak said that he wanted people to work together as a team, and he did not need anyone who did not want to work as a team. In the context of mentioning the names of Brion Smith and Bill Plunkard, Dlubak said, ''Let's face it, these guys aren't here for one reason only. They're not here because I don't want them here. They'll never work here again.''

By stating that he would not ''have a union in here,'' Dlubak implied plant closure if the employees selected a union. He said that he wanted only people working for him who were part of the team, and he made it clear that union supporters were not part of the team. He claimed responsibility for termination of the employment of two employees who supported the Union, and implied that would be the fate of others who made the mistake of crossing him by supporting the Union.

In January 1989, 2 days before the election, Dlubak asked employee Jeffrey Copeland,[16] in the presence of employee Steve Meleason, whether Copeland was going to vote for the Union or for the Dlubak team. Jeffrey Copeland testified that he did not respond to Dlubak's question. Employee Steven B. Meleason testified that Dlubak asked, ''How do you stand? Are you with them union people or are you on the Dlubak team?'' Meleason stated that Dlubak said that he was not going to put up with a union telling him what to do, and a union would not hurt him. Both Copeland and Meleason testified that they related to other employees what Dlubak had said.

In this conversation, Dlubak interrogated employees about their support for the Union, clearly said that union supporters were not on his team, which carried with it a threat to their continued employment, and said that he would not bargain with a union, raising the specter of union-employer strife.

The testimony by Dlubak Corporation employees relating to Dlubak's remarks was, in several instances, corroborated by more than one witness. Frank Dlubak was not called as a witness, and, therefore, the testimony concerning his remarks stands unrebutted.

Highly corroborative of the employees' testimony concerning Frank Dlubak's ''Join the Dlubak Team'' campaign theme is the contents of a disarmingly informal letter he sent to his employees on November 9, 1988 (G.C. Exh. 25(a)).[17] That letter contains threats of reductions in wages and benefits if the employees do not join the ''Dlubak Team'' by rejecting the Union, and retaliation against union supporters for their support of the Union. The letter bears the title, ''JOIN THE DLUBAK TEAM,'' and concludes with the sentence, ''Ask yourself whose team you would rather be on, Frank Dlubak's or theirs?'' In between, the letter chastises an unnamed employee identified as being one of the main fig-

[10] A glass bender employed by Dlubak Corporation for 5 years.

[11] Cushey testified that employees Kijowski, Dosch, and Smith had been passing out literature at the bottom of the plant's driveway.

[12] Donald Snyder testified that he is a self-employed barber, and that Frank Dlubak has been a customer of his for 2 years.

[13] A crew chief in the aluminum division, employed by Dlubak Corporation for 7 years.

[14] Smith was laid off on October 7, 1988, and was not recalled.

[15] Employee William Plunkard was discharged on October 6, 1988. Prior to that he had distributed union authorization cards to other employees.

[16] Jeffrey Copeland, a laborer in the aluminum division, has been employed by Dlubak Corporation for 5 years.

[17] The letter is addressed to ''All Employees,'' and is stated, in an informal style, to be from ''Frank.''

ures in the ''certain group in the company who have tried to convince you how terrible your current condition is, and how wonderful you will have it if you just say yes to a union,'' for failing to appreciate the good benefits offered by the company, especially after he pleaded to be recalled following a layoff.[18] The letter continues with the statement, ''After listening to the pitch of these outsiders, this person probably also wasn't aware that a union cannot guarantee you anything, not even the maintenance [sic] of the benefit package and wage structure currently in place.'' Further on, the letter states, ''Only the company can provide you with the pay and benefits you receive from your employment here, and, union or not, you can receive nothing it doesn't agree to.''

Having had the opportunity to observe the demeanor of the witnesses, and considering all the testimony and other evidence, as well as the failure by the Respondent to call Frank Dlubak as a witness to rebut the remarks attributed to him, I find that the witnesses who testified about Dlubak's statements are credible, and their testimony, especially in light of the corroboration provided by Frank Dlubak's letter to his employees of November 9, 1988, is sufficient to establish by a preponderance of the evidence that Frank Dlubak made the remarks and took the actions described above.

The common thread running through Dlubak's conversations with his employees in the period before the union election, and repeated in his letter to his employees of November 9, 1988, was that he did not want to deal with a union, he would not deal with a union, and that any of his employees who supported the Union were disloyal and not on his team. He said he did not want any employees working for him who were not on the Dlubak team. He explicitly stated that two known union supporters, Smith and Plunkard, were no longer employed because he did not want them there. Dlubak predicted that a union would shut the plant down. Implicitly, if not explicitly, Dlubak, who said there was no law saying where he had to operate his plant, threatened to close the plant and move it elsewhere if the Union got in.

In *NLRB v. Gissel Packing Co*., 395 U.S. 575, 617 (1969), the Supreme Court noted that Section 8(a)(1) of the Act prohibits interference, restraint, or coercion of employees in the exercise of their right to self-organization. An employer's threat to close a plant if the employees select a union as their collective-bargaining representative is a form of threatened reprisal because the employees are engaging in union activity, and as such violates Section 8(a)(1) of the Act. *Sertafilm, Inc*., 267 NLRB 682 (1983); *NLRB v. Gissel Packing Co*., supra.

Implicit, as well as explicit, threats of plant closure if employees vote for a union violate Section 8(a)(1) of the Act. *So-Lo Foods*, 303 NLRB 749 (1991); *Sertafilm, Inc*., supra; Cf. *St. Agnes Medical Center*, 304 NLRB 146, 148 (1991); *Impact Industries*, 285 NLRB 5 (1987). The Board indicated in *St. Agnes Medical Center*, supra, that threats of plant closure are among the types of violations which cannot be adequately remedied by the customary notice posting and cease-and-desist orders.

Even a veiled threat to discharge employees for engaging in union activities or supporting a union is a threat of reprisal for engaging in union activity, and as such violate Section 8(a)(1) of the Act. *Kona 60 Minute Photo*, 277 NLRB 867 (1985). Frank Dlubak's linkage of opposition to the Union with being a member of the Dlubak team, coupled with his statements that he wanted only employees who were on his team, amounted to thinly veiled threats to the future employment by Dlubak Corporation of union supporters. In *Baddour, Inc*., 281 NLRB 546, 548 (1986), the Board found that a statement ''that the Company is no place for employees who want a union,'' alone, violated Section 8(a)(1) of the Act. Dlubak's ''Dlubak Team'' remarks clearly fall into the category of veiled threats of discharge, and violate Section 8(a)(1) of the Act.

In *So-Lo Foods*, supra, the Board, citing *Histacount Corp*., 278 NLRB 681, 689 (1986), and *Platronics, Inc*., 233 NLRB 155, 156 (1977), said that ''[i]n evaluating comments concerning 'bargaining from scratch,' the Board cases draw a distinction between (1) a lawful statement that benefits could be lost through the bargaining process and (2) an unlawful threat that benefits will be taken away and the union will have to bargain to get them back.'' Considered in the context of the entire letter, together with the numerous ''hallmark'' unfair labor practices committed by Respondent, as set out in this decision, one reasonable inference to be drawn from the remarks contained in the letter about ''maintenance of the benefit package and wage structure currently in place'' and ''only the company can provide you with the pay and benefits you receive . . . and you can receive nothing it doesn't agree to,'' is that the remarks amount to at least an oblique, if not overt, threat that current benefits and wages will be taken away and the union, if victorious in the election, will have to bargain to get them back. In another recent case, *Shaw's Supermarkets*, 303 NLRB 382 (1991), the Board declined to change extant law, and stood by its belief that by threatening employees that the employer would bargaining from scratch if the employees selected a union to represent them, an employer violates Section 8(a)(1). Accordingly, I find that the letter contains threats which violate Section 8(a)(1), and those threats are attributable to Frank Dlubak, Respondent's highest management official, who signed the letter.

Considering Frank Dlubak's status as both the owner of Dlubak Corporation,[19] and its president, there can be no doubt of the chilling effect on his employees of his repeated implied threats of plant closures if the employees chose a union to represent them, interrogation of employees concerning their union views and how they would vote in the election, disparaging comments about union supporters, and his threats to get rid of disloyal union supporters, coupled with statements that the Union could not even guarantee the current wage and benefits package and the employees would receive nothing other than that to which the Company agreed,

[18] The reference seems to be to Brion Smith, who was a foreman in the aluminum division until he was laid off in 1987. After working for another company for 5 months, Smith asked David Bazzano for his job back, and was rehired. Although he was not reinstated as a foreman, he retained his seniority for pay purposes. Later, he was asked, but declined, to be a crew leader.

[19] Dlubak Corporation is a closely held family business, employing approximately 100 or less employees, owned by Frank Dlubak and his wife. Only Frank Dlubak, however, appears to be active in management of the business, at least, from the perspective of the corporation's production employees.

which amounted to a threat that negotiations with the Union would start from scratch or zero. The Board has said that ''an employer's unlawful conduct is heightened when it is committed by the highest-level management official.'' *Impact Industries*, supra, 285 NLRB at 6. Dlubak's threats, which were widely disseminated among the employees, as he clearly intended that they would be, were made over a period of approximately 3 months preceding the election, which Respondent acknowledges is a critical period. Dlubak made it clear that his test for continued employment in his business was personal loyalty to him, and that union supporters were disloyal, not to mention being lazy misfits. It would take a rather courageous employee, indeed, to give any indication of support for a union under conditions in which support of a union was equated to disloyalty and placed the employee's continued employment in jeopardy.

The Board has often held that interrogation of employees concerning their union activities and the union activities of other employees, and creation of the appearance of surveillance of employees' union activities are unlawful and violate Section 8(a)(1) of the Act. *Baddour, Inc*., supra.

The Board's test for determining whether interrogation of employees concerning their union activities or the union activities of other employees is set out in *Rossmore House*, 269 NLRB 1176, 1177 (1984): ''Whether under all of the circumstances the interrogation reasonably tends to restrain, coerce, or interfere with rights guaranteed by the Act.'' The Board has said that a totality of the circumstances test must be applied, even when the interrogation is directed to unit members whose union sympathies are unknown to the employer. *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985). Some of the considerations taken into account by the Board in determining whether under the totality of the circumstances the interrogation was coercive include: Whether the employee interrogated was an open and active union supporter; whether there is a history of employer hostility towards or discrimination against union supporters, whether the questions were general and nonthreatening, and whether the management official doing the questioning had a casual and friendly relationship with employee being questioned. *Sunnyvale Medical Clinic*, supra at 1218.

In *Hanes Hosiery*, 219 NLRB 338 (1975), the Board said of interrogation that:

> We long have recognized that the test of interference, restraint, and coercion under Section 8(a)(1) of the Act does not turn on Respondent's motive, courtesy, or gentleness, or on whether the coercion succeeded or failed. The test is whether Respondent engaged in conduct which reasonably tends to interfere with the free exercise of employee rights under the Act.

In this case, the interrogation of employees by Frank Dlubak, the highest-level management official of Respondent, took place in an atmosphere of open hostility on his part, and on the part of the Respondent, whose policy Dlubak set, towards unions and his employees selecting a union as their bargaining representative, and discrimination by Respondent against union supporters. The Respondent within the first week of the union organizational campaign had already discharged one employee for his union activities, and laid off other employees who were openly active in their support for the Union. Dlubak's remarks to his employees were laced with at least implied threats of plant closure, layoffs, discharge, and other unspecified reprisals against union supporters; disparagement of union supporters; linkage of loyalty to him with opposition to the Union; and, remarks creating the appearance of surveillance of the activities of union supporters. Under the totality of the circumstances, I find that his interrogation of employees was coercive and in violation of Section 8(a)(1) of the Act. *Kona 60 Minute Photo*, 277 NLRB 867; *Churchill's Supermarkets*, 285 NLRB 138 (1987).

Creating the impression of surveillance of employees union activities violates Section 8(a)(1) of the Act. *Keystone Pretzel Bakery*, 242 NLRB 492 (1979); *Overnight Transportation Co*., 254 NLRB 132 (1981). Likewise, use of disparaging language by an employer to describe union supporters to other employees is coercive and a violation of Section 8(a)(1) of the Act. *M. K. Morse Co*., 302 NLRB 924 (1991).

The unrebutted evidence establishes that in contacts with his employees during the Union's organizational campaign, Frank Dlubak violated Section 8(a)(1) of the Act by threatening his employees with loss of their jobs and benefits if they supported the Union, threatening that bargaining would start from scratch, making disparaging remarks about employees who supported the Union, coercively interrogating his employees about their union activities and the union activities of other employees, threatening unspecified forms of reprisal against union supporters, threatening plant closure, and creating the appearance of surveillance.

b. *8(a)(1) violations by Benjamin M. Claypool*. Any notion that Frank Dlubak's intentions were benign and that his remarks were harmless is dispelled by the complementary actions and statements of Benjamin M. Claypool, the production manager or plant manager, and Martha Patton, supervisor of the lamination department. The record is replete with testimony by company employees concerning interrogation, threats, and disparagement of union supporters by Plant Manager Claypool, and to a lesser extent, by Supervisor Martha Patton. These employees placed themselves at considerable economic risk by testifying against their employer, and, as noted, testimony by employees under such conditions is a factor tending to support their credibility. Although Claypool denied making many of the remarks attributed to him, or did not recall having made them, I find that his demeanor was evasive and his testimony unconvincing.

It is quite clear that both of these supervisors took Frank Dlubak's threat to close the plant if the employees chose representation by a union very seriously, so seriously, in fact, that they picked up on that threat and repeated it over, and over, again. Taking his lead from Frank Dlubak, Claypool interrogated employees about their union activities and those of other employees, disparaged and threatened union supporters with layoff and loss of their jobs, and threatened employees with reduction in wages and benefits, strikes, and other adverse consequences if they chose a union to represent them, as well as with closure of the plant by Frank Dlubak. Under these circumstances, where it is evident that Claypool, himself, feared closure of the plant and loss of his own job if the Union won the election, a fear which it is equally evident that Supervisor Martha Patton shared, it can hardly be doubted that the employees had every reason to take that threat just as seriously.

John E. Shinn, the Union's International representative assigned to the Dlubak organizational campaign, first met with a group of seven Dlubak Corporation employees on September 30, 1988. On or about October 2, 1988, employees of Dlubak Corporation began distributing union literature and union authorization cards to other employees.

On October 5, 1988, Plant Manager Benjamin Claypool interrogated employees about their knowledge of union activities at the plant and the union activities of other employees, and created the impression that he was surveilling employees' union activities. At approximately 3:30 p.m., Claypool interrogated employee David Crotallo[20] by asking him what he knew about a union. Crotallo replied that all he knew was that there was talk of a union going through the plant. Claypool interrogated Crotallo about the union activities of other employees by asking him if employees William (Buck) Plunkard, Brion Smith, Kevin Dosch, and Mark Kijowski had been handing out union authorization cards. Crotallo said, ''No.'' Claypool's questioning, which was directed at specific employees' activities, created the impression that he was surveilling the activities of those employees. Later, Crotallo related his conversation with Claypool to members of his crew and to other employees.[21]

Later that day, at about 5:30 p.m., Claypool appeared on the glass division floor, and interrogated Crotallo's crew about union activities at the plant, creating in the process the appearance of continuing surveillance. He asked members of Crotallo's crew questions about union activities at the plant, and told them that he would be back to the plant later that evening, but not to tell anyone.[22] Present, in addition to Crotallo, were Greg Claypool (Benjamin Claypool's son), Ron Shankle, Todd Fennell, and Kenny Bowser.

On the same day, Crotallo told employee Greg S. Chrissman[23] that Claypool was asking about the Union and what was going on. Crotallo said that he thought that Claypool knew that Buck Plunkard had been passing out union authorization cards. Crotallo said he was not going to turn in the union authorization card he had received, because he was afraid the Company would find out and fire him.

On the same day, Claypool told maintenance employee Robert Fox[24] and another maintenance employee that he (Claypool) had a problem, specifically, that the aluminum department was trying to start a union. Claypool said that Bill (Buck) Plunkard was passing out union authorization cards.[25] Claypool's remark not only suggested that he was engaging in surveillance of Plunkard's union activities, but, by describing the passing out of union authorization cards as a problem, Claypool raised the possibility that he intended to take some retaliatory action to eliminate that problem.

In October 1988, Claypool told Snyder that he expected production to drop because of the union activity, and that he expected the employees to break bends (aluminum bends) on purpose and ''screw up anything mechanical.''[26] He told Snyder to watch the employees at all times.

In October 1988, Claypool openly threatened to layoff employees engaged in union activities. Shortly before the layoff of aluminum division employees, Claypool said to Snyder, ''Well, Jeff, they're trying to get a goddamn union in here again. If they want to try to get a union in here, they'll all be laid off.''

On October 10, 1988, Claypool threatened reprisals against union supporters, when he showed employee Kenneth Bowser[27] a letter which he said some employees had signed saying the Union was backing them. Claypool said they had ''just hung themselves.''

On other occasions between October 1988 and the January 12, 1989 election, in conversations with Bowser, Claypool threatened that unionization would bring with it loss of wages and jobs. He said that the Union would bring down the wages of older workers and drive up the wages of younger workers. He also told Bowser that Dlubak would go bankrupt within 2 years, because they would have to raise prices and would not be able to compete. On several occasions, Claypool interrogated Bowser about the union activities of other employees. He told Bowser he had a list of those employees he thought were for the Union and those he thought were against it, and asked Cushey which employees he thought were for it. Bowser said he just shrugged his shoulders. Later, he said, he told employees Frank Cushey and Greg Crissman about his conversations with Claypool.[28]

On November 1, 1988, Claypool described union supporters in disparaging terms to employee Frank Cushey[29] when he said they ''were nothing but dead weight.'' Claypool de-

[20] David Crotallo, a glass cutter, has been employed by Dlubak Corporation for 4 years.

[21] Claypool denied having had such a conversation with Crotallo. He said that he knew nothing about a union at that time, and did not ask Crotallo what he knew about it, or whether Plunkard or Smith were handing out union cards.

[22] Claypool denied that this conversation ever took place.

[23] A 3-year employee of Dlubak Corporation, now working in the boxing department of the glass division. From March 1987 to March 1989, Chrissman worked in the pan shop.

[24] Robert Fox has been employed by Dlubak Corporation for 2–1/2 years as a maintenance worker. He repairs motors, pumps, and doors, and does general building maintenance work. Until February 1, 1989, he worked at the Freeport plant. Since then he has worked at the Kittanning plant, where he also helps load and unload furnaces.

[25] Claypool denied making these statements to Fox and White.

[26] Claypool denied making these statements to Snyder. He said that he did tell Snyder that the work flowing into aluminum was slowing down.

[27] Kenneth Bowser worked for Dlubak Corporation from March 1987 to June 1989 as a glass bender. Ben Claypool is Bowser's uncle. Bowser stated that he wore a company button given to him by Claypool, and led Claypool to believe he was for the Company, because he was afraid for his job. He stated that he did not think he ever told Claypool that he had signed a union authorization card.

[28] Claypool stated that Bowser is his wife's nephew. He denied making the statements Bowser attributed to him.

[29] A glass bender, Frank Cushey has been employed by Dlubak Corporation for 5 years. His brother-in-law is Nicholas J. Kuchta, one of the earliest supporters of the Union. Cushey admitted that he did not tell Claypool or other company officials that he supported the Union. He stated that in various conversations with Claypool, he actually spoke in opposition to the Union. He stated that at the same time, he told other employees about his conversations with Claypool. Cushey stated that he did not initiate any of the conversations he had with Claypool in which Claypool discussed the Union. Cushey first disclosed his union preference 2 days before the election by wearing a union shirt. Since then, he said, neither Claypool nor any other company official has spoken to him about the Union.

scribed employee Arthur Brendlinger, a union supporter, as an example.[30]

On another occasion, Claypool blatantly interfered with the Section 7 rights of employees to choose whether or not to support a union, and created the appearance that employees' union activities were under surveillance when he told Cushey that he had heard that employee Kirk Bauer was for the Union, and told Cushey ''to get on him and change his mind.''

In mid-November 1988, again in the presence of Crew Chief Crotallo and other members of his crew, Claypool disparaged union supporters and threatened plant closure if the employees selected the Union to represent them. Referring to employees of the aluminum division who were on layoff,[31] Claypool commented that it was ironic that even after they had come out in support of the Union, they were still getting their bonuses.[32] Claypool stated that if the Union came in, Frank (Dlubak) would close the place up.[33] Crotallo repeated Claypool's remarks to other company employees. Claypool brought up his resentment that the aluminum division employees on layoff were getting bonuses several times after that.[34]

In a conversation with Mark Gorog[35] and Jeff Copeland in November 1988, Claypool threatened employees with loss of wages and benefits if Dlubak's employees selected the Union. He said that it was better working Dlubak at $9 an hour than at Pullman Standard at $13 an hour.[36] He said that the employees would have to negotiate a contract with Dlubak Corporation if they chose to have a union represent them, and they would have to start from scratch, because Frank (Dlubak) would only give them what he wanted to give them.[37] Gorog told other employees about this conversation with Claypool. During the same conversation with Claypool, however, Gorog asked if he would be fired because he sent a letter to Frank Dlubak stating he supported the Union. Claypool stated that he was not going to be fired.

In an early November 1988 conversation with Jeffrey Copeland, a known union supporter since early October 1988,[38] Claypool continued to disparage union supporters and threatened plant closure if the employees selected the Union. Claypool said that he could not believe ''we had jumped on the bandwagon.'' He said that if the Union came in, ''we'd all be looking for jobs in a couple of years.'' He added that the Union would bring the Company down, ''destroy it.'' He said that employees working in the aluminum division were people who could not fit in other places in the Company, and the aluminum division was ''more or less the last stop before getting fired.'' When Copeland asked if that meant him, Claypool replied that he did not actually mean Copeland, just the people he worked with. Copeland said that after he started wearing a union hat, Claypool stopped talking to him. When Copeland asked why, Claypool replied that he could not believe that he was supporting the Union.

Also in November 1988, Claypool told Crotallo that the laid off aluminum division employees would not be recalled.[39]

In another disparaging comment about union supporters in December 1988, Claypool told Crew Chief Meleason that ''you make your own job security, all unions are good for is people who don't do their jobs.''

On or about December 8, 1988, Claypool initiated a 2-1/2 hour discussion with four aluminum division employees, Nicholas J. Kuchta, Robert Bowser, Jeffrey Snyder, and Arthur Brendlinger,[40] during which he made denigrating and disparaging remarks about union supporters, and threatened plant closure if the employees selected the Union. Kuchta testified that Claypool said, ''The only reason we wanted a union was so we didn't have to do our work and we could be lazy and lay around and stuff.'' He said a union would not hurt the Company, but within 2 years high demands by the Union would force the Company to shut down.[41] Claypool said that the Union at Pullman Standard was the cause of that company shutting down, and he believed the same thing would happen at Dlubak if the Union came in.[42]

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[30] Claypool denied making the statements attributed to him by Cushey on this occasion.

[31] Including Mark A. Kijowski, Mark R. Gorog, Nicholas J. Kuchta, Robert L. Bowser, Brion Smith, and Kevin Dosch, all of whom had attended the union meeting on September 30, 1988, and had signed union authorization. Together with two other employees, Ron Vantine and Jeffrey Copeland, these employees, all of whom were employed in the aluminum division, were laid off on October 7, 1988. Copeland signed a union authorization card on October 4, 1988, after being solicited by Nicholas Kuchta.

[32] Dlubak Corporation paid a $500 bonus to its employees on October 13, 1988.

[33] Claypool testified that he did not recall a conversation in which he told Crotallo, Bowser, Fennell what would happen if the Union came in. He said he could have had a conversation about the Union in November 1988, but did not recall the content.

[34] Claypool denied making such a statement.

[35] Mark R. Gorog has been employed by Dlubak Corporation for 5 years as an aluminum bender. After being laid off on October 7, 1988, Gorog sent a letter to Frank Dlubak, declaring his support for the Union.

[36] Claypool, in his testimony, described Pullman Standard, as a unionized employer for which he formerly worked until it had gone out of business. Claypool testified that the union at Pullman Standard had not done him any good. At a December 8 or 9 meeting with a number of Dlubak employees, he said that all he did was pay into the Union, and it did nothing for him.

[37] Claypool admitted that he told Gorog and Copeland that if the Union won there would be negotiations to find out why they would end up with. He told them that they were not necessarily going to keep everything they had. He said he told them they could not just keep what they had and negotiate more. They would have to negotiate everything. He admitted that he said that if Dlubak had a lot of extra expenses when negotiations took place, the Company would have to raise prices, competition would beat them out, and probably people would be laid off. Claypool denied making the other remarks attributed to him on that occasion.

[38] Jeffrey Copeland sent a letter to Frank Dlubak after being laid off on October 7, 1988, declaring his support for the Union.

[39] Claypool denied making this statement.

[40] Kuchta and Bowser have been employed by Dlubak Corporation for approximately 5 years as aluminum benders. Jeffrey Snyder, an employee of Dlubak Corporation for 7 years, is a crew chief in the aluminum division. Arthur Brendlinger, an employee of Dlubak Corporation for 3-1/2 years, was a floor sweeper at that time.

[41] Claypool denied this statement, but admitted that he told Bowser that if the Union made a lot of high demands, Dlubak would have to raise prices, the Company would lose business to it competitors, and it would have to lay off employees.

[42] Claypool acknowledged saying on that occasion that his experience with the Union at Pullman Standard was that it did nothing for him. He told Kuchta and Bowser that he could not guarantee jobs for them at Dlubak if the Union lost, but if they did what they were

Bowser, who had also worked for Pullman Standard, and Claypool argued about whether that company closed because of the union or bad management.[43]

Jeffrey Snyder, testifying about the same meeting, related that Claypool said that it would cut the place down to nothing if a union came in the shop, and that everyone, including Snyder, would be out of a job. Claypool accused Snyder of purposely dropping production because of the Union, a charge which Snyder denied. At the time of that meeting, Kuchta, Bowser, and Snyder openly supported the Union.

In several conversations with employee Frank Cushey in December 1988 and January 1989, Claypool repeated earlier threats of plant closure and the inevitability of strikes if the employees selected the Union, disparaged and denigrated union supporters and threatened reprisals against them, and interrogated Cushey about the union activities of other employees.

On December 27 or 28, Claypool predicted eventual plant closure if the employees selected the Union, and threatened reprisals against certain employees because of their union activities. He told employee Cushey that if the Union made it, it would make outrageous demands, and to meet some of those demands, the Company would have to raise prices and would lose customers.[44] Before long, he said, everyone would be out of work. Claypool stated that regardless of the outcome, he was going to get rid of Nick Kuchta, Bob Bowser, and Bruce Offredi. He said that he would fire them when they did the slightest thing wrong.[45] Claypool interrogated Cushey about the union activities of other employees when he showed Cushey a list of names, including those of Brad Kuhn, Doug Leipertz, Jim Cravener, and David Crotallo, who, he said, he was pretty sure were for the Union, and asked Cushey what he thought.

Three weeks before the election, Claypool told employee Cushey that the Union was no good and was just for people who did not want to work. Claypool stated that Frank Dlubak did not need the ''aggravation or the money'' and could ''shut this place tomorrow and live off what he has.''[46]

In January 1989, Claypool told Cushey that if the Union won, there would be a strike, and everyone would be out of work. He said Cushey should encourage employees to cross the picket lines.

On the Monday before the election, which was held on January 12, 1989, Claypool interrogated employee Crotallo about the union activities of other employees.[47] Claypool showed Crotallo a list of approximately eight names, including those of Frank Cushey and Jim Hudek, and said he was trying to get some idea of who was for the Union. Crotallo told Claypool that he was not for the Union. Crotallo, in fact, had signed a union authorization card on October 15, 1988.[48] Crotallo related his conversation with Claypool to other employees.

Crotallo returned to work on January 8, 1989, after being on workmen's compensation leave since being injured on November 13, 1988. At that time, his wife was expecting a child. During the week of January 8, 1989, Claypool told Crotallo that if the Union came in, the employees would go out on strike, and then he asked Crotallo what he would do when the money ran out, especially considering the Crotallos' expected child. Crotallo replied that he did not know.[49]

A substantial credibility issue is raised by the conflicting testimony of David Crotallo and Benjamin Claypool regarding what was said by Claypool to Crotallo. After observing the demeanor of the two witnesses while they testified, and weighing the probability or improbability of their testimony in light of other testimony in this case, as well as their apparent motives for testifying truthfully or untruthfully, and taking into consideration the jeopardy in which Crotallo placed himself by giving testimony adverse to his employer, I find that David Crotallo is a credible witness, and Benjamin Claypool is not.[50] I credit Crotallo's testimony, and I reject as untruthful that of Benjamin Claypool.

There are other instances in which Claypool interrogated employees about their union activities, and threatened plant closure if the employees selected the Union. Several weeks before the election, Claypool stopped employee Todd

supposed to, they will have jobs. He said that Kuchta was breaking bends, and he warned him to stop.

[43] Apparently Claypool and Bowser had posted letters in the plant in which they traded charges about the cause of Pullman Standard going out of business. During the meeting, Claypool accused Bowser of purposely breaking company material, then withdrew the allegation.

[44] Claypool acknowledged that he told Cushey that high union demands could cause loss of customers by raising the price of glass.

[45] Claypool later took a first step in trying to make good on his threat to get rid of Offredi by issuing a written warning to Offredi for wearing a union emblem on his hardhat, infra.

[46] Claypool admitted that he talked to Cushey about the Union several times, and in response to questions from Cushey, stated that he did not know what would happen if the Union won. He stated it was possible Frank Dlubak was going to shut down the plant. He denied telling Cushey that the Union was no good, or that when the campaign was over, he was going to get rid of the union supporters. He denied telling Cushey that Frank Dlubak could close down the plant and live off his money.

[47] Claypool testified that he did not recall talking to Crotallo about anything on the Monday before the election. He stated that he did not tell Crotallo he had a list of names and was trying to get a feel for who was for the Union, nor did he show Crotallo a list of names.

[48] Crotallo testified that he first received a union authorization card from Kevin Dosch on October 4, 1988. He agreed to sign it, but subsequently tore it up after learning that William Plunkard's employment had been terminated. He later signed another card given to him at his home by Kevin Dosch.

[49] Claypool acknowledged that during a conversation on January 9, 1989, Crotallo asked what would happen if the Union won. According to Claypool, he told Crotallo and another employee named Shankle that there would be negotiations leading to a new contract. He told them he did not know what would happen. He denied he told them there would be a strike, and he denied that he asked Crotallo what he would do for money for his new child if there was a strike.

[50] Crotallo testified that he played two roles. He said that although he supported the Union, he was afraid that if the Company found out it would fire him, so he told the Company he was not for the Union. Crotallo acknowledged that in his November 9, 1988, statement to NLRB agent Ron Kisak, he said that Claypool had not talked to him about the Union since October. Crotallo said he was nervous and scared at the time, and remembered other conversations after Kisak had left his home. I find nothing in the omission to discredit his testimony at the hearing.

Placek[51] and asked him why he was for the Union.[52] Placek, who had worn a union T-shirt to work, answered, giving three or four reasons. At some point prior to the election, Claypool told Tina Goodgasell[53] that if the Union won, Frank Dlubak would shut the plant down.[54]

The issue here is essentially one of credibility. It is Benjamin Claypool's word against that of a number of company employees. I find Claypool to be entirely lacking in credibility. By contrast, I find that the employees who testified about statements made by Claypool are credible, and their testimony is not only believable, but entirely consistent with the nature of Frank Dlubak's well-known antiunion sentiments.

Although Claypool denied that Frank Dlubak ever told him he was opposed to his employees joining a union, Claypool acknowledged that did not mean he was unaware of Dlubak's opposition. He admitted that he had received copies of the literature distributed by the Company in its campaign against the Union. More significantly, however, Frank Dlubak made no effort to hide his opposition to his employees joining a union; in fact, he went out of his way to make his employees aware of his opposition, and in the process violated the Act, by threatening, implicitly, if not explicitly, closure of the plant and adverse consequences to employees who supported the union. Claypool did not need to be told that by Frank Dlubak, personally, or by other management officials, of his employer's blatant antiunion sentiments. His knowledge is evident from the fact that he echoed the same threats made by Frank Dlubak. It is, in fact, quite evident that Claypool believed that Dlubak would close the plant if had to deal with a union, and it was, I conclude, Claypool's fear for his own job, as much or even more than his personal dislike of unions,[55] which motivated his persistent efforts to discourage and intimidate employees from voting for the Union.

The evidence establishes that Benjamin Claypool violated Section 8(a)(1) of the Act by threatening employees with reprisals, including termination, layoff, and reprisals of an unspecified nature against employees for supporting the Union; interrogating employees about their union activities and the union activities of other employees; creating the appearance of surveillance of employees engaged in union activities; disparaging, belittling, and denigrating employees who supported the Union and engaged in union activities; threatening employees with loss of jobs and benefits, lower wages, and plant closure resulting from unreasonable demands by the Union, which would drive up the Company's prices, drive away customers, and decrease the Company's profitability; threatening employees with the inevitability of strikes, if the employees selected a union; threatening plant closure by the Company's owner if the employees selected a union; and, threatening that bargaining would start from scratch.

[51] A glass cutter on the cutdown crew, who has been employed by Dlubak Corporation since January 1988.

[52] Claypool denied this conversation.

[53] A 7-year employee of Dlubak Corporation, Tina Goodgasell is a crew chief in the lamination department. Her supervisors are Ben Claypool and Marti Patton.

[54] Claypool denied making any such statement to Goodgasell.

[55] It is immaterial whether Claypool violated the Act because of his personal dislike for unions, or because he was afraid for his own job, or a combination of both.

c. *8(a)(1) violations by Martha Patton*. A 12-year employee of Dlubak Corporation, Martha (Marti) Patton is the lamination supervisor in the glass division. Her immediate supervisor is Benjamin M. Claypool. Her department performs all special glass laminating projects, and tests samples for customers. She prepares work schedules and records work times for employees in the lamination department. She supervises 3 crew chiefs and 21 employees in the lamination department. Her department normally operates three shifts a day.

Taking her lead from Frank Dlubak and Benjamin Claypool, Martha Patton actively interrogated, harassed, belittled, and threatened employees in the lamination department because of their union activities during the period from October 1988 to January 1989. Whether she involved herself in actively trying to defeat the union organizing drive because she feared for her own job, or for some philosophical disagreement with unions, or a combination of both, is largely irrelevant, although from her statements and actions it appears more likely that she feared that Frank Dlubak would close the plant if the Union won recognition, and her opposition was largely based on fear for her own job.

In December 1988, Martha Patton threatened that Frank Dlubak would close the plant or move it if the employees selected a union to be their collective-bargaining representative. She told employees Phyllis Lubiniecki and Lisa Minteer that ''Frank would close the place down if the union came in.'' In the same conversation, she said that Dlubak probably would close the plant or move it to another location. Lubiniecki repeated Patton's remarks to other employees, including Tracy Reuter, Rena Bellotti, Dirk Fennell, J. J. Walker, and Frank Osche.

Patton denied ever talking to Lubiniecki and Minteer about what would happen if the Union came in. She said she did not tell Lubiniecki before Christmas that Frank would close the place down or move if the Union came in. She denied telling Lubiniecki that there should be no Christmas bonus because of the ''God damn'' Union. For reasons discussed, infra, I do not credit her testimony.

In December 1988, Martha Patton interrogated an employee about his union views, and coupled the interrogation with a threat that Frank Dlubak might close the plant. She asked employee J. J. Walker, in the the presence of another employee, Dirk Fennell, what he thought about the Union. Walker said that unlike Patton, who thought that the Union would hurt (the employees) if it came in, he thought it would hurt if the Union did not come in. Patton told Walker, ''I don't know, J. J., Frank's just liable to pack up and leave.''

Patton testified that she does not recall telling Walker that she thought a union would hurt the Company. She said she does not think she told Walker that Frank would be liable to pack up and leave if the Union came in.

On another occasion in December 1989, Patton, in the presence of employees Lubiniecki, Minteer, and Goodgasell, belittled employees who had been laid off because of their union activities, when she said they should not receive the Christmas bonus (of $25) because of the ''damn union.''

About a week before the January 12, 1989 election, she harassed Dirk Fennell and J. J. Walker, both employees in the lamination department, because of their union activities, and coupled the harassment with a threat of loss of jobs and closure of the plant if the employees selected the Union. She

told Fennell and Walker that ''if we didn't like our jobs here, why didn't we just quit.'' She said she was afraid that if the Union came in, ''Frank Dlubak would pack his bags and leave, then we'd all be out of a job.'' Patton denied making those statements to Fennell. She stated she did not remember having a conversation about the Union with Fennell in mid-December.

Rena Bellotti, a laminator/insulator, proclaimed her support for the Union by wearing a union T-shirt on the two nights preceding the election. She testified that prior to that she and Marti Patton, her supervisor, had been very friendly, but for several months afterwards, Patton ostracized her by refusing to talk to her or make eye-contact. Bellotti heard from two coworkers, J. J. Walker and Dirk Fennell, that Patton had told them she was afraid the plant would close down if the Union came in.

Patton denied that Bellotti had worn a union T-shirt prior to the election, or that she stopped talking to her after the election. She said everyone was quiet after the election.

A day or two before the election, Patton created the appearance of surveillance of employees' union activities, coupled with an implied threat of retaliation, when she singled out employees who had worn a union T-shirt by posting a list of their names in the lamination division work area, without further explanation. Dirk Fennell wore a union T-shirt on the 2 days preceding the election. On the next work day, after he first wore the T-shirt, Fennell observed a list of names attached to the window behind Patton's desk. On the piece of paper, which was located in an area customarily used by Patton to post notices to her crew, were the names, without any further explanation, of those employees who had worn union T-shirts the day before.[56] Tina Goodgasell took the list down, but another similar list replaced it the next day. This time the list remained posted for several days. When Fennell questioned her about the purpose of the lists, Patton denied knowing why the names were posted; however, Fennell, who was familiar with Patton's handwriting, testified that the lists appeared to be in her handwriting. Fennell's testimony concerning the list was corroborated by J. J. Walker.

Patton said that she had a conversation with J. J. Walker about the Union, during which he asked her about a list of names. She said she told him she did not know what he was talking about.

Having had the opportunity to hear the testimony of the witnesses and to evaluate their credibility while on the stand, I find that the employee-witnesses are more credible than Martha Patton.

As in connection with testimony concerning statements or actions by Frank Dlubak and Benjamin Claypool, the Respondent pointed out several instances in which employee-witnesses testified to events or conversations not contained in their prehearing affidavits given to Board agents. I find that this fact in no way diminishes or shakes their credibility. The witnesses in the press of events may well have forgotten to mention some incidents, or they may have mentioned them and the Board agent may have failed to note them. But, whatever the explanation may be, after observing the employee witnesses testify, and observing their demeanor on the stand, I conclude that they testified truthfully.

After observing Martha Patton's testimony, and observing her demeanor, I conclude that her denials are not credible. She was a reluctant witness, appeared ill-at-ease, and, at times she was evasive in her answers and unable to recall what she said.

Accordingly, I credit the testimony of the employee witnesses, and discredit the testimony of Martha Patton, and I find that the General Counsel has proven by a preponderance of the evidence that Patton made the statements, and took the actions attributed to her. I find that she created the appearance of surveillance; coercively interrogated employees about their union activities and views; threatened employees with plant closure and loss of jobs and wages if the employees of Dlubak Corporation selected a union as their collective-bargaining representative; disparaged and belittled employees because of their union activities; and, impliedly threatened employees with unspecified reprisals because of their union activities, by posting lists of the name of employees who engaged in union activities. Her actions violated Section 8(a)(1) of the Act.

d. *Employer's communications about the Union*. The evidence conclusively establishes that the Employer, through its owner and president, Frank Dlubak, and supervisory personnel, principally Plant Manager Claypool and Supervisor Martha Patton, threatened employees with loss of jobs, wages, and benefits, and closure of the plant because, Respondent maintained, the Union would make unreasonable demands, resulting in strikes, increases in the Company's costs, decreases in its profitability, all of which would result in loss of customers because of the higher prices it would have to charge.

In *NLRB v. Gissel Packing Co*., supra, 395 U.S. at 617, the Supreme Court, after noting that employers have a free speech right to communicate their views to employees, further pointed out that Section 8(c) of the Act:

> merely implements the first Amendment by requiring that the expression of ''any views, argument, or opinion'' shall not be ''evidence of an unfair labor practice,'' so long as such expression contains ''no threat of reprisal or force or promise of benefit'' in violation of Section 8(a)(1). Section 8(a)(1), in turn, prohibits interference, restraint or coercion of employees in the exercise of their right to self-organization.

In discussing the standards for evaluating an employer's statements, the Court said at 395 U.S. at 618–619:

> Thus, an employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a ''threat of reprisal or force or promise of benefit.'' He may even make a prediction as to precise effects he believes unionization will have on his company. In such case, however, the prediction must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control or to convey a management decision already arrived at to close the plant in case of unionization. See *Textile Workers v. Darlington Mfg. Co*., 380 U.S. 263,

[56] On the list, in addition to Fennell's name, were the names of Jimmy Walker, Tracy Reuter, Phyllis Lubiniecki, and Rena Bellotti.

> 274, n. 20 (1965). If there is any implication that an employer may or may not take action solely on his own initiative for reasons unrelated to economic necessities and known only to him, the statement is no longer a reasonable prediction based on available facts but a threat of retaliation based on misrepresentation and coercion, and as such without the protection of the First Amendment. We therefore agree with the court below that ''[c]onveyance of the employer's belief, even though sincere, that unionization will or may result in the closing of the plant is not a statement of fact unless, which is most improbable, the eventuality of closing is capable of proof.'' *NLRB v. River Togs, Inc*., 382 F.2d 198, 202 (C.A. 2d Cir. 1967).

The Supreme Court, in *Gissel*, said that an employer can avoid crossing the line between ''so-called permitted predictions and proscribed threats'' by making his views known without engaging in ''brinksmanship.'' At least, said the Court, ''he can avoid coercive speech simply by avoiding overstatements he has reason to believe will mislead his employees.''[57] The Court said that the Board could reasonably conclude that the ''import'' of the employer's message ''was not to predict that unionization would inevitably cause the plant to close but to threaten to throw employees out of work regardless of the economic realities,'' where, among other factors, ''the petitioner had no support for its basic assumption that the union, which had not yet even presented any demands, would have to strike to be heard.''[58]

Much the same situation prevails in the instant case. The Respondent's threats that the Union would present unreasonable demands which would result in strikes, increase in the Company's prices and cause loss of customers, loss of profitability, lowering of wages and loss of benefits, and ultimately, plant closure and loss of jobs, were not based in any degree upon objective fact. There is, for example, no basis in objective fact for threats that the Company would be forced to increase its prices if the employees chose a union, which, in turn, would cause a loss of customers, and would create the economic necessity of closing or moving the plant, laying off employees, or reducing wages or benefits. Dlubak and his supervisory personnel had no rational basis for concluding that a union, in general, or this Union, in particular, would make unreasonable demands, or would intentionally precipitate a strike, or, in fact, would take any action resulting in loss of profitability of the Company. Neither Frank Dlubak, nor his management officials and supervisors, it appears, had any prior dealings with the Charging Party Union. They had no knowledge, nor any rational basis upon which they might surmise, what demands the Union would make in collective bargaining, or that the Union would be arbitrary, capricious, or unreasonable in negotiating with the Company. Vague rumors of other plant closings as a result of unionization are no substitute for objective fact. *NLRB v. Gissel Packing Co*., supra.

The statements which Dlubak, Claypool, and Patton made to the Company's employees were unrelated to economic necessity. They were not based on objective fact, nor did they represent demonstrably probable consequences beyond the Company's control. In the words of the Supreme Court, in *Gissel*, the statements were not reasonable predictions ''based on available facts but a threat of retaliation based on misrepresentation and coercion, and as such without the protection of the First Amendment.''

Accordingly, I find that threats of reprisal, ranging from specific threats to fire or layoff union supporters, to unspecified threats of retaliation, made by Frank Dlubak, Benjamin Claypool, and Martha Patton violated Section 8(a)(1) of the Act. So also did foundationless predictions by company officials and supervisors that selection of a union by the employees would inevitably lead to strikes, and loss of jobs, wages, and benefits, because the Union would make unreasonable demands which would precipitate strikes and would drive up the Company's prices, drive away customers, destroy the Company's profitability, and, ultimately, force closure of the plant.

e. *Doorway incident*. The General Counsel contends that Martha Patton, the supervisor of the lamination department in the glass division, violated Section 8(a)(3) and (1) by pushing aside an employee, because the employee was a union supporter. The Respondent argues that the shoving incident did not occur, and even if it did, the relationship to the employee's union activities is too tenuous to justify finding a violation.

In late January 1989, Phyllis Lubiniecki, a laborer in the lamination department, who had made her support for the Union known by wearing a union T-shirt the night before the election, met Martha Patton, the supervisor of the lamination department, approaching from the opposite direction, at a doorway between the hall and the insulating room. Lubiniecki testified that Patton pushed her aside and went through the doorway. Lubiniecki felt that she had the right-of-way, because she was half way through the doorway when Patton pushed her aside. Neither Lubiniecki nor Patton said anything to each other on this occasion. Lubiniecki also stated that she had a friendly relationship with Patton, but after making her support for the Union known, Patton was very cold towards her.

Patton testified that she did not know if Lubiniecki wore a union T-shirt; she stated that she had never saw anyone wearing a union T-shirt. She did not remember an incident in which she allegedly pushed Lubiniecki aside as they were both going through a doorway.

The evidence concerning the doorway incident involving Lubiniecki and Patton is equivocal. I cannot find from the evidence that either one of them clearly had the right of way through the doorway. Even assuming that such an incident occurred, it appears that Lubiniecki was no more prepared to yield to Patton than Patton was prepared to yield to Lubiniecki. Under these circumstances, I do not find that the doorway incident amounted to an unfair labor practice. It could just as easily have been no more than a case of two stubborn people being equally rude and inconsiderate towards each other. Under these conditions, the General Counsel has not met its burden of proof by a preponderance of the evidence.

[57] 395 U.S. at 620.
[58] 395 U.S. at 619.

f. *Notice restricting movement of employees.* In October 1988, Steven B. Meleason[59] saw Claypool post a notice in several areas of the aluminum shop. The notice, which announced restrictions on the movement of employees within the plant, was similar to a notice which had been posted for 1 day approximately 6 months earlier. Meleason stated that other than on that occasion, he and members of his crew had been permitted to leave their work areas, and it had not been necessary for members of his crew to check with him first. The October 1988 notice remained posted for 2 to 3 weeks. Claypool told Meleason that the notice meant that if anyone wanted anything from a vending machine they were to get it and come straight back to their shop area. Claypool told Meleason that Meleason was accountable for the notice remaining posted, and he wanted Meleason to report the name of any person who might take it down.

Crew Chief Jeffrey S. Snyder[60] saw the notice restricting movement of employees. He was not aware of any such policy before October 1988. Employee Todd Placek, on the other hand, while not aware of any specific rule against it, said that he did not think he was allowed to go to other departments if he did not have business there.

Dlubak Corporation's chief executive officer, David Bazzano, testified that it was company policy that employees should move about through the plant only with the permission of their crew chiefs. He said that he had a memo to that effect posted in 1987, and, on October 13, 1988, after he noticed that it had been torn down, and directed Ben Claypool to repost it. He told Claypool to make sure that people were aware of the policy.

The intimidating impact on employees of the sudden imposition of restrictions on their movement coinciding with the beginning of a union organizing campaign is obvious. Bazzano's explanation that no linkage was intended is unbelievable. Even assuming that the notice had been posted, however briefly, 6 months previously, it is implausible that Bazzano failed to notice its absence for 6 months, and only coincidently took notice of the fact and acted to have the notice posted again after a union organizing drive had begun in the plant.

The General Counsel, citing *Sands Motel*, 280 NLRB 132 (1986), and *Erie Technological Products*, 218 NLRB 878 (1975), contends that Bazzano's real purpose was ''to stifle communication between its employees regarding the Union.'' I find that to be a reasonable inference which can be drawn from the evidence of record.

Accordingly, I find that CEO David Bazzano violated Section 8(a)(1) and (3) of the Act by directing the posting of a notice restricting the movement of employees, in retaliation for their engaging in union activities and to impede communication among the employees.

II.

a. *Discharge of William P. Plunkard.* It is undisputed by the parties that William P. Plunkard, whose nickname is ''Buck,'' an employee of Dlubak Corporation in the aluminum division's pan shop, was discharged on October 6, 1988. At issue is the question of whether he was discharged for cause, as contended by the Respondent, or in retaliation for his union support and union organizing activities, as contended by the General Counsel and the Charging Party.

In October 1988, Respondent operated two pan shop shifts of two people per shift. The first shift worked from 7 a.m. to 3 p.m., the second, or afternoon shift, worked from 3 to 11 p.m. It was usual at that time for the pan shop personnel to work a considerable amount of overtime. On October 5, 1988, the two pan shop employees working the afternoon shift were William P. Plunkard, an employee of Dlubak Corporation since 1985, and Greg Crissman, who had worked for Dlubak Corporation for about 3 years. Plunkard was the senior employee (in terms of time employed by Dlubak Corporation) on that shift, and he had the added responsibility of keeping certain written records of the pan shop's production during his shift. He did not have the title of crew chief, however.

It appears to be undisputed that Plunkard and Bruce Offredi, the senior pan shop employee on the morning shift, and, apparently the senior employee on both shifts, wanted additional pay for performing recordkeeping duties relating to the pan shop's daily production, and, from time to time, jointly and individually, made such requests to Benjamin Claypool. As of October 5, 1988, however, neither of them received any extra pay for performance of their recordkeeping duties.

The recordkeeping duties performed by Plunkard included keeping track of the time he and Crissman spent on each job and recording the times on a timesheet, checking job folders, and determining the order in which jobs were to be performed, and maintaining a record of the jobs performed on his shift. Plunkard also had responsibility for checking materials and stock on hand to make sure that the pan shop did not run low or out of materials. It appears that Offredi performed similar recordkeeping duties for the day shift.

Plunkard was initially contacted by Brion Smith and Kevin Dosch about signing a union authorization card on Tuesday, October 2, 1988. On October 3, 1988, Plunkard received two cards from Smith and Dosch, one for Greg Crissman and one for himself. On the afternoon of October 3, 1988, Plunkard distributed additional union authorization cards to Bruce Offredi and John Osche, the morning shift pan builders, and to at least three other employees. On October 4, 1988, Plunkard spoke to David Plunkard, his brother, about signing a union authorization card.

On October 5, 1988, approximately one-half hour before the afternoon shift started, Benjamin Claypool asked David Crotallo what he knew about a union getting started. Crotallo replied that there were rumors about a union going through the plant. During the conversation, Claypool asked if Buck Plunkard had been handing out union authorization cards. Claypool also questioned the other members of Crotallo's crew about the Union, and, he told the crew that he would be back that night, but not to tell anyone.

Claypool testified that he went to the plant about 10:30 p.m. on October 5, 1988, to check on a water problem. Claypool said he looked into the pan shop and saw Plunkard and Crissman standing there. About 25 minutes later, he returned, and saw them standing in the same spot. When they saw Claypool coming, Crissman went to get another pan, and

[59] Stephen B. Meleason has been employed by Dlubak Corporation since 1983. He has been a crew chief in the Company's aluminum division for a little over 3 years.

[60] Jeffrey S. Snyder, a crew chief in the aluminum division, has been employed by Dlubak Corporation for 7 years.

Plunkard went to the lunchroom, which doubled as an office for the pan shop, to get another job set up. Claypool said he looked at the paperwork on which is recorded the amount of time spent on each job, and saw that it was filled out through 1 a.m. Claypool objected to the fact that Plunkard had completed the timesheet for the entire shift, although the shift was not yet completed, and told Plunkard to do the paperwork the right way. Plunkard replied that if he received 50 cents an hour more, he would do the paperwork. Claypool also stated that Plunkard had cleaned up the shop, and appeared to be finished working for the night, even though they had 2 hours remaining on their shift.[61]

Plunkard acknowledged that he had filled in the timesheets for the entire 10-hour shift, even though 2-1/2 hours of working time remained. Plunkard told Claypool that no one had instructed him on how to fill out the timesheets. He said that if he and Crissman did not complete the job they were going to be working on by quitting time, he would leave the job for Offredi. Plunkard denied that he told Claypool he was not going to do the paperwork until he got more money. He acknowledged that he did say to Claypool ''if you don't like the way I do the paperwork, give it to Greg Crissman. Why should I have to do it because I am the senior man.''

That evening, after Claypool had left, Plunkard wrote the following message in a notebook which he and Offredi used to communicate with each other about both personal and work-related matters: ''No more paperwork. I don't know how. Show me the right way. Fuck it, no paper work at all. [Signed, ''Buck.'']''

The next morning, Claypool testified, he found the note from Plunkard in a notebook in the pan shop area. Claypool stated that the note pad from which he took the note was always there on the desk, and he had looked in it on many occasions to make sure the top priority jobs had been set up. He said that the two pan shop shifts used the notebook to pass information between them concerning top priority jobs. Claypool stated that notebook was called ''Bruce and Buck's Love Book,'' and that Bruce Offredi and Buck Plunkard had started it. Other employees did not write notes in the notebook. Claypool acknowledged that the notebook was not one which the Company required to be kept.

Claypool stated that took the note from the notebook, and the paperwork, and showed them to Bazzano. He recommended to Bazzano that Plunkard be discharged for insubordination. Bazzano told him to call Plunkard at home, and tell him he was fired.

Claypool stated that he knew before October 5, 1988, that Offredi and Plunkard occasionally filled out their paperwork ahead of time, and he had in the past talked to them about that. He said that although he had to speak to Offredi about filling out the paperwork in advance, he was getting pretty good about doing as he was told. He said that Offredi did not refuse to fill out the paperwork.

Claypool stated that he did not mention the union organizing campaign to Plunkard, and that he did not know that Plunkard was engaged in union activity, and did not fire him for union activity. He admitted that he did not tell Plunkard to do the paperwork for that evening over again.

Bruce Offredi testified that he and Buck Plunkard used the notebook as a means of communicating between the two shifts about uncompleted work. Offredi said the notebook was called, ''Bruce and Buck's Logbook.'' The notebook was normally left on the desk, and they did not intend for it to be used by supervisors. They also used it for passing personal nonjob related notes, such as jokes.

Offredi stated that it was his practice to record in advance the last job which he would be working on during a shift and complete the timesheet before the shift ended. He stated on the first day of each week, he would fill in the time required for doing the paperwork, lunchtime, cleanup time, and miscellaneous time for the entire week, for himself and John Osche, who worked with Offredi. Offredi testified that he did not receive any instructions from management concerning how to fill out the required paperwork until October 6, 1988, after Buck Plunkard had been fired.

On October 6, 1988, at about 2 p.m., Claypool placed a telephone call to Plunkard, at his home, and told him to come in and pick up his pay, and go sign up for unemployment compensation. When Plunkard asked Claypool if that meant that he was fired, Claypool told Plunkard to take it any way he wanted. The next day, while cleaning out his locker at the plant, Plunkard had a conversation with Claypool and Dan Porter, a supervisor in the glass department, during which Claypool told Plunkard that he was being fired for insubordination based upon the note which Plunkard had left in the logbook which he and Offredi used, and because his paperwork had not been done correctly.

On the same day, Plunkard spoke to David Bazzano, the Chief Executive Officer of Dlubak Corporation, about being fired. Bazzano told Plunkard that it was Claypool's decision to fire him. Bazzano told Plunkard that he had been fired because of the note which Plunkard had left for Offredi, and because he had filled out the paperwork wrong.

Based on Claypool's recommendation that Plunkard be fired for insubordination, Bazzano testified that he authorized Plunkard's discharge.[62] Bazzano said that Claypool had told him that he had come to the plant about 10 p.m., the previous evening, and had noticed Plunkard sitting idle and the pan shop cleaned up, even though the shift did not end until 1 a.m. Claypool said that he had looked at the paperwork, and found that it had already been completed to 1 a.m. He said that he told Plunkard to put the times down as each job was completed, not in advance. According to Claypool, Plunkard refused. Claypool gave Bazzano the note, taken from the notebook in the pan shop, signed by Plunkard. Bazzano stated that Plunkard's refusal to follow Claypool's instructions put him on the edge of being fired, and the note, stating that his fellow workers should not listen to Claypool, was definite grounds for dismissal.

Bazzano testified that Plunkard said that he would do the paperwork for more money, but he had not been trained to do the paperwork and did not know how. Bazzano said he confirmed to Plunkard that he was fired. At one point in his testimony, Bazzano said that Plunkard told him that he refused to do the paperwork, later, however, he said that he did not hear Plunkard say that. Bazzano acknowledged that he was not sure whether or not Claypool told Plunkard to do that night's paperwork over again.

[61] Plunkard testified that he was working a 10-hour shift that day.

[62] Bazzano testified that Plunkard was not the first employee terminated for insubordination.

On October 6, 1988, Bruce Offredi asked Benjamin Claypool why Plunkard had been fired. Claypool replied that Plunkard was fired for insubordination, and because he was a troublemaker and instigator.

Later, on October 24, 1988, Claypool said to Plunkard, ''I'm fed up with you asking for a fifty cent raise and causing trouble, and Bruce [Offredi] asking for the same raise and stuff.'' Plunkard asked Claypool why he had not issued a written or verbal warning. Claypool replied that he did things the way he wanted to.

In December 1988, Plant Owner Frank Dlubak told Crew Chief Jeffrey S. Snyder that Plunkard was not here because he refused to do his paperwork, and that was an automatic dismissal. He said that he did not need anyone who did not want to work together as a team, and, referring to Plunkard and Brion Smith,[63] Dlubak said, ''Those guys aren't here for one reason only, they're not here because I don't want them here, and as far as I am concerned they'll never work here again.''

Upon a prima facie showing by the General Counsel that protected activity was a motivating factor in an employer's discharge of an employee, the burden shifts to the employer to show that it would have discharged the employee even in the absence of the protected activity. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983); *Huttig Sash & Door Co*., 300 NLRB 93 (1990).

Proof of motive, except in the rather rare situation in which motive is clearly stated, is necessarily by circumstantial evidence. Here, the General Counsel has made a strong prima facie showing that union activity was a motivating factor in Plunkard's discharge.

The chain of circumstantial evidence, based on the testimony of employees of Respondent, including William Plunkard, all of whose testimony I do find to be credible, convincingly shows that Plunkard's discharge was pretextual. There is strong evidence of Claypool's antipathy to unionization of Dlubak Corporation, generally, and strong evidence that he believed that Plunkard was involved at an incipient union organizing campaign at Dlubak Corporation, and singled out Plunkard at the inception of the union organizing campaign to make an early example of him, for the purpose of intimidating other employees. Further, there is credible evidence that Respondent's treatment of Plunkard was disparate. Respondent knew long beforehand that both Offredi and Plunkard were in the habit of filling out timekeeping records in advance, but did little to curb that practice, and, unlike Plunkard, who was fired, took no disciplinary action against Offredi for similar practices; indeed Claypool testified that there were still times when Offredi filled out timekeeping records in advance, but, he said, Offredi was getting better about it. The pretextual nature of Plunkard's alleged offense, coupled with Respondent's disparate treatment of Plunkard, Claypool's awareness of Plunkard's involvement in the union organizing campaign, and the timing of Plunkard's discharge in relation to his protected union activity, are sufficient to support the inference that the protected activity was a motivating factor in Claypool's discharge decision. *Huttig Sash & Door Co*., supra.

There is credible evidence that Plunkard, although not one of the employees who attended the first union organizing meeting on September 30, 1988, began distributing union authorization cards on October 3, 1988. On October 5, 1988, Claypool asked another employee if Plunkard had been handing out union authorization cards, and questioned the employee and other members of his crew about union organizing activities at the plant. Claypool told the crew members that he would be back to plant that night, but not to tell anyone.

Late in the evening of October 5, 1988, at about 10:20 p.m., Claypool appeared in the pan shop area, and confronted Plunkard over certain recordkeeping practices which Claypool, by his own admission, knew that both Plunkard and Bruce Offredi, the senior employee in the pan shop and the senior employee on the daytime pan shop shift, used. On the evidence, I find that the encounter was not one of chance. Rather, Claypool deliberately sought out Plunkard that night, with the intent of the provoking an incident, which conveniently, and from Claypool's perspective probably not unexpectedly, turned up in the form of recordkeeping practices which he well knew that not only Plunkard, but Offredi, as well, used. The fact that he singled out Plunkard, whom he suspected of being involved in the incipient union organizing campaign, at a time when Plunkard was on duty, but Claypool was not, supports the conclusion that the confrontation and Claypool's suspicions about Plunkard's union organizing activities are related.[64]

In any event, the evidence clearly shows that Plunkard did not disobey or refuse to comply with with any directive from Claypool that night. Claypool did not tell him to change the existing records, nor did Plunkard tell Claypool that he would not keep the records in the future. The plain inference to be drawn from the incident is that Claypool came to the plant that night, with the intent of finding something which he could use to make an example of Plunkard.

For reasons stated more fully in part I, above, I find that Benjamin Claypool is not a credible witness. Over the period from October 1988 to the election in January 1989, he time and again demonstrated extreme antiunion animus, and a determination to pressure the employees he supervised not to support the Union. His denial under oath that he had engaged in 8(a)(1) violations set out in part I, above, was contrary to the evidence and was false. I do not find his testimony that he did not fire Plunkard because he had engaged in union activity to be anymore truthful.

As justification for firing Plunkard, Claypool, who recommended discharge, and CEO Bazzano, who approved it, relied on a note which Claypool found the next morning in a notebook which Offredi and Plunkard, who worked different shifts, used to communicate with each other about job-related and other nonjob-related matters. It is undisputed that they were not required by the Company to keep a notebook for that purpose, and, there is no claim by the Company that the notebook containing the note from Plunkard was fur-

[63] Smith had been laid off on October 5, 1988, and had not been recalled.

[64] The fact that Claypool knew beforehand that both Plunkard and Offredi took what might be termed short cuts in their recordkeeping, but evidently took no prior strong action to put a stop to it, suggests that the practice was not nearly as egregious as Claypool, in his testimony, professed.

nished by the Company or was company property. The undisputed evidence is that the notebook was the property of Offredi and Plunkard, and that they used it for their own convenience and their own ends. Thus, the insubordination, if that is what it was, was not committed by Plunkard in the performance of any company-assigned duty.

Further, the note, although intemperate, does not clearly state a refusal to perform assigned recordkeeping duties. Taken out of context, refusal is one element of the note, certainly. However, read as a whole, the note also expresses frustration about a lack of training from the Company concerning how they wanted the records kept, and a desire on Plunkard's part for such training. Thus, I conclude that the meaning of the note is equivocal, and, clearly, Claypool and Bazzano chose to give it the worst possible interpretation.

Not only did Claypool and Bazzano give the note, which the evidence shows was never intended to be communicated to management, the worst possible interpretation, they took the action of firing Plunkard without affording him any opportunity to explain his intention. And, not only did Claypool and Bazzano act precipitously, they chose the harshest punitive action, ignoring other forms of lesser punishment which might have been equally appropriate, even assuming that Plunkard was insubordinate. For example, they could have reprimanded Plunkard, reassigned the recordkeeping duty to the other member of the pan shop's afternoon shift, or even, suspended Plunkard for a time. That none of these or other options were discussed, added to their failure to give Plunkard even the most rudimentary due process of giving him a chance to explain himself, confirms that the note and its contents were seized upon by Claypool and Bazzano as an excuse to rid the company of a suspected union supporter.

I find that the reasons given by Claypool and Bazzano for firing Plunkard are pretextual. Respondent has not overcome the strong prima facie evidence of union animus by showing that Plunkard would have been fired for cause in the absence of his union activity. The contention by Respondent that Plunkard was fired because he refused to complete certain paperwork associated with his job is unpersuasive. Respondent has failed to present any convincing evidence that it considered insubordination to be automatic grounds for dismissal. The evidence convincingly shows that Respondent's treatment of Plunkard was disparate. Even though Claypool, and thus, Respondent, knew beforehand that both Offredi and Plunkard filled out timesheets in advance, Offredi and Plunkard were never informed that they risked discharge if they repeated the practice, nor was any effort made to train them in the Company's preferred method of recordkeeping, not, that is, until after Plunkard had been fired. Neither was Offredi fired for doing the same thing for which Respondent asserts it fired Plunkard. I conclude that there is insufficient evidence to corroborate Respondent's claim that the discharge of Plunkard was consistent with punishment administered in the past to other employees who committed similar acts of insubordination.

Any possible lingering doubt concerning Respondent's discriminatory motives in firing Plunkard were resolved against Respondent by the statement made by Plant Owner Frank Dlubak, who said of Plunkard and Brion Smith, another known union supporter, that ''those guys aren't here for one reason only, they're not here because I don't want them here, and as far as I am concerned they'll never work here again.''

I find that Respondent has not met its burden under *Wright Line* of overcoming the General Counsel's prima facie case of discriminatory discharge because of antiunion animus by showing that it would have discharged Plunkard even in the absence of his union activity. Cf. *Eddyleon Chocolate Co*., 301 NLRB 887 (1991); *Family Foods*, 300 NLRB 649 (1990). Accordingly, I find that Respondent violated Section 8(a)(1) and (3) of the Act by terminating the employment of William Plunkard because he joined, supported, or assisted a union.

b. *Layoff of employees*. On October 7, 1988, Respondent laid off seven of its aluminum division employees: Mark R. Gorog, Kevin Dosch, Mark A. Kijowski, Nicholas J. Kuchta, Brion Smith, Jeffrey Copeland, and Ron Vantine. Of those employees, Mark Kijowski was not recalled until January 14, 1989, and Brion Smith and Kevin Dosch have not been recalled at all. The remainder were recalled approximately a week after being laid off. The General Counsel contends that the aluminum division employees were laid off in retaliation for their union organizing and support activities. Respondent contends that the employees were laid off for business reasons.

The Respondent contends that the layoff was prompted by a slowdown in work for the aluminum division, and the seven employees laid off were the seven employees with the lowest seniority, in terms of time employed by the Company. Except for Brion Smith, the General Counsel does not challenge the assertion that the employees laid off were lowest in seniority in the aluminum division.[65]

Steven B. Meleason, a crew chief in the aluminum division for 3 years, testified that work in the aluminum division slowed down prior to the October 7, 1988, layoff. Earlier that week, Ben Claypool told him that the aluminum division, which had been operating three shifts a day, would probably be cut back to two shifts. He stated that would only affect Mark Gorog and Mark Kijowski, and they would have the option of transferring to the glass division for a week or so. Meleason said that prior to the October 7 layoff, layoffs were by seniority.

Jeffrey S. Snyder, also a crew chief in the aluminum division, testified that prior to the layoff, Ben Claypool told him that work in the aluminum division would be slow for 3 to 4 days, and that employees in the aluminum division could be transferred to the glass division or outside maintenance, in place of being laid off. Snyder said that in the past, layoffs and recalls had been by seniority. Shortly before the lay-

[65] Smith was originally hired by Respondent in September 1979, and was promoted to foreman, a position he held for 2 years until he was laid off in 1987. After being laid off, he worked for another employer for 5 months before returning to work for Dlubak Corporation in the summer of 1987. When he returned to work, he was paid at the rate of $9 per hour, rather than the new employee starting rate of $4 per hour, and received 2 weeks of vacation, as he had before being laid off. The Company granted 2 weeks of vacation to employees with 5 years of service. Smith testified that when he returned to work for the Dlubak Corporation, CEO Bazzano told him there was no problem with his keeping his seniority. After being laid off on October 7, 1988, Claypool told him that his seniority date was 1 year. If his seniority date is considered to be September 1979, there were a number of employees with less seniority than he had who were not laid off. If his seniority date is considered to be the summer of 1987, Mark Gorog, who seniority is less, was recalled ahead of Smith.

off, Claypool said that ''they're trying to get a goddamn union in here again. If they want to try to get a union in here, they'll all be laid off.'' In December 1988, Claypool said that neither Brion Smith nor Bill Plunkard would ever work for the Company again.

Snyder stated that none of the employees who were laid off were offered transfers to other divisions. Following the layoff, Claypool stated that from then on there would be no transfers between the glass and aluminum divisions.

Snyder testified that the workload in the aluminum division was heavy during the week following the layoff. The first of the laid-off employees to be recalled were Nick Kuchta and Bob Bowser. Claypool told Snyder that he was not to allow Bowser and Kuchta to work together, or to wander through the shop. Snyder stated that he had never received instruction like that before.[66]

Snyder stated that during December 1988, Frank Dlubak said that he did not want a union in the plant and would not have one. He spoke of the men on layoff, stating that he wanted only people who would work together as a team, and that the reason that the men were on layoff was because he did not want them at the plant, and they would never work there again.

David Crotallo, a glass cutter, testified that on October 5, 1988, Benjamin Claypool asked questions about a union getting started. Claypool specifically asked if Brion Smith, Kevin Dosch, and Mark Kijowski had been handing out union authorization cards. On several occasions, he heard Benjamin Claypool state that the laid-off employees should not be getting a bonus given by the Company, because of their union activities. In November 1988, he heard Claypool state that the aluminum division employees on layoff would not be recalled.[67]

After Bowser and Kuchta were recalled, the aluminum division worked either 5 10-hour or 6 8-hour days a week until March 1989. The overtime was mandatory. In the past whenever the aluminum division had been reduced to two shifts, it was rare to work overtime. At about the same time as the layoff in the aluminum division, the Company hired new employees in the glass division.

Approximately a week after the October 7 layoff, Nick Kuchta, Jeff Copeland, Mark Gorog, and Ron Vantine were recalled. At about the same time, the aluminum division personnel began working 6 days a week, sometimes 10 hours a day. Prior to that, the average workweek had been 5 days a week, 8 hours a day. The extended work schedule remained in effect until Easter 1989.

Five of the seven employees laid off on October 7, 1988, had attended the union organizing meeting on September 30, 1988, and at that time, signed union authorization cards. The employees who attended the meeting were Nicholas Kuchta, Mark Gorog, Mark Kijowski, Brion Smith, and Kevin Dosch. Jeffrey Copeland signed a union authorization card, given to him by Nicholas Kuchta, on October 4, 1988.

Mark Kijowski testified that on October 4, 1988, Ben Claypool told him and Mark Gorog that work in the aluminum division was becoming slow, but Claypool did not want to lay anyone off. Claypool told Kijowski that as the senior man, he had the opportunity to transfer to boxing, the cutting table, or plant 2.[68] Claypool told them to think about it, and he would get back to them. Instead, on October 7, 1988, Claypool told Kijowski that the aluminum division was going down to one shift, and that Kijowski would be laid off.

Kijowski was laid off on October 7, 1988. He was not recalled until approximately January 15, 1989. He testified that the recall was not conducted by seniority.[69]

Kijowski testified that he had contacted the Union in mid-September 1988, and that he met with the Union's representative, John Shinn, On September 30, 1988. Also attending the meeting were Dlubak employees Mark Gorog, Nick Kuchta, Bob Bowser, Brion Smith, and Kevin Dosch. All the employees who attended the meeting signed union authorization cards, and Kijowski agreed to solicit cards from other employees. Kijowski started distributing cards to Dlubak employees on October 2, 1988, and in the first week he obtained 28 signed cards.

Mark Gorog corroborated Kijowski's testimony concerning their conversation with Ben Claypool on October 2, 1988. He testified that Claypool said they were in a slow period, and he would give Kijowski and Gorog their pick of places they could work: the Kittanning plant, boxing, or the cutting table.

Gorog stated that the aluminum division had been working 5-day weeks before the layoff, but between October 17, 1988, after he was recalled, through March 1989, there was no shortage of work in the aluminum division, which worked 6 days a week throughout the period.

Kevin Dosch testified that he has been on layoff since October 7, 1988, and that less senior employees, including Mark Kijowski, Jeff Copeland, Ron Vantine, and Mark Gorog, have been recalled. Dosch testified that earlier in the week preceding October 7, Claypool had asked him if he wanted a voluntary layoff,[70] which Dosch declined. Claypool assured him that the layoff would be by seniority. Claypool told him that there was to be a cut back of one shift, and that the layoff was not permanent.

Dosch, who attended the September 30 union organizing meeting and signed a union authorization card, said that on October 4, 1988, while in the company parking lot, he gave a union authorization card to another employee, at a time when Greg Claypool, the son of Ben Claypool, was standing nearby. He could not say with certainty that the younger Claypool overheard his conversation with the other employee.

Nicholas Kuchta said that about a week before he was laid off on October 7, 1988, Ben Claypool told him that work in aluminum was getting slow. Claypool said they were going to move Kijowski and Gorog. Towards the end of the week,

[66] Bowser had accepted a voluntary layoff.

[67] Smith, Dosch, and Kijowski were still on layoff in November 1988.

[68] Kijowski said that he was aware that in the past employees were transferred to other divisions to avoid a layoff. He added, however, that past layoffs by the Company had not always been based on seniority. Kijowski said that he considered the Company's layoff policy to be unfair and that was one of the reasons he contacted the Union.

[69] Mark Gorog, a less senior employee, was recalled after being on layoff for 1 week.

[70] The Company appears to have asked employees from time to time to volunteer to be laid off. Employee Robert Bowser accepted a voluntary layoff during the week Dosch and the others were involuntarily laid off.

after hearing a rumor there was to be a layoff, Kuchta asked Claypool whether there would be a layoff, or would people be moved around. Claypool did not give him an answer. Instead, Claypool later spoke to Kuchta's wife by telephone, and informed her that Kuchta had been laid off.

Kuchta was aware that employees had been moved to other divisions in the past to avoid layoffs. Approximately 1-1/2 years' earlier, he and Jeff Copeland had been given a choice of being laid off or moving to the glass division. Kuchta said that in the past layoff were mostly by seniority, and, as far as he knew, recalls were by seniority. One employee, however, had been laid off out of seniority, and never recalled. Kuchta stated that a few times in the past 5 years, the Company had laid-off employees and never recalled them. He said it was the way they fired people.

After being recalled, Kuchta worked a 6-day shift until the holidays, when the shift changed to 5 days a week for a couple of weeks. After the holidays, he reverted to a 6-day shift. During this period, the aluminum division operated with two shifts a day; however, for a time, it operated with a third, one man, shift. He stated that the aluminum division has not gone back to three full shifts since the October 7 layoffs.

David Bazzano, Dlubak Corporation's CEO, testified that he made the decision to lay off employees Smith,[71] Kijowski, Dosch, Kuchta, Copeland, Vantine, and Gorog, based on information he received from Barbara Fratta that work in the aluminum division was extremely low. He said that he decided to cut back the aluminum division from three shifts to one shift. He stated that all those laid off were employed in the aluminum division, but a couple were in the wrapping or packaging area of the department.

Bazzano acknowledged the Company hired new employees for the glass division the same week as the layoff occurred. He said that the glass division was busy, and he intended to put the newly hired people into full-time positions after 90 days. According to Bazzano, transferring people from the aluminum division to the glass division for a week or two would not have accomplished his overall goal of augmenting the glass division work force. He denied that he had authorized Ben Claypool to ask employees if they would be interested in moving to another department prior to the layoff.

Bazzano stated that the layoff lasted 1 week, during which the aluminum division remained at one shift. After a week, four of the laid-off employees were recalled so that the aluminum division could go to two shifts, to meet its increased workload. He stated that although the Company usually followed seniority in recalling laid-off employees, it did not always do so, and he decided to recall on the basis of ability, not seniority, in this instance. He decided to recall the four employees he thought would be most interested in ''getting the product out the door.'' He decided not to recall the other three until the workload required.[72]

Bazzano denied that he knew at the time of the layoff that any of the employees selected for layoff were engaged in union activities, but, he acknowledged that at the time of the recall he knew through letters which the Company received from the employees that Mark Gorog, Kevin Dosch, Brion Smith, and Bob Bowser had engaged in union activities.

According to Bazzano, he learned that the three laid-off employees had been active in making phone calls to other employees and visiting them at their homes, as well as at the shop during the afternoon and midnight shifts. Claypool told him that the purpose of the phone calls was to get other employees to support the Union. Bazzano said that it was his opinion that these three employees were more likely to put their communications with other employees concerning their feelings about the Union ahead of the job functions which they performed. He said he wanted people who would be more likely to get the product out the door and to continue working, and who would keep whatever opinions they held as a secondary matter. Although Bazzano denied that he decided not to recall them because of visible signs of their support of the Union, he admitted that he felt that these three employees would be more interested in ''conveying the idea of the union,'' than in ''producing the product and getting it out the door.'' He added that if there was enough work for three shifts, he would have recalled these three employees, also.

Benjamin Claypool denied that he said anything to Kijowski before the layoff about moving employees to other areas of the plant. He denied talking to Kuchta about the Union, at all. He denied that he told any employees that other employees who wanted the Union would be laid off or not recalled because of their union activities. He acknowledged that he told Crew Chief Snyder that recalled employees were not allowed to work together, but he admitted telling Snyder that they were to stay in position and do the work. He denied that he told Snyder that they were not allowed to leave the work area together.

I credit the testimony of the employees over that of CEO Bazzano and Benjamin Claypool. Neither of them has been candid in their testimony concerning incidents relating to the union organizing campaign. The employees, on the other hand, were, with the exception of Bowser, still employees of Dlubak Corporation, and underwent considerable risk in testifying against company interests.

Applying the *Wright Line* analysis, I find that the General Counsel has established a prima facie case that protected union activity was a motivating factor in Respondent's layoff of seven of its employees on October 7, 1988. Respondent's awareness that at least four of the employees it laid off were openly engaged in union activities, and the timing of the layoff in relation to that activity, and to the discriminatory discharge of William Plunkard 2 days before because of his open union activities, are sufficient to support the inference that the employees' union activities were a motivating factor in their layoff.[73] It is clear that earlier in the week of the

[71] Bazzano said the layoff was by inverse seniority, that is the person with the least time with the Company were laid off first. He said that Smith had been terminated as a supervisor of the aluminum division, and after a break in employment of several months, was rehired as a production worker. He acknowledged that when Smith was rehired, he was given wages and benefits of a longer term employee.

[72] The three employees Bazzano did not recall were Brion Smith, Kevin Dosch, and Mark Kijowski. The four who were recalled were Mark Gorog, Jeffrey Copeland, Ron Vantine, and Nicholas Kuchta.

[73] Where the employer has not offered a credible explanation for the timing of the layoff and selection criteria, the fact that an employee who may not have engaged in union activity was laid off with others who had, does not preclude a finding that discriminatory motives lay beneath the timing and selection. *Eddyleon Chocolate Co.*, supra at 891. The timing of the layoff, coinciding as it did with the beginning of the union organization campaign, together with Re-

layoff, Benjamin Claypool told two or more employees that they would be allowed to switch to other departments because work in the aluminum division was getting slow. That did not occur, however, and on October 7, 1988, those two employees and five others were laid off. It may well be that work in the aluminum division dropped off.[74] However, it is evident that over several days time, something happened to cause the Company to layoff seven employees, rather than to temporarily assign them to other departments of the Company, as had been its past practice. There is a strong inference that the ''something'' which happened was the start of the union organizing campaign.

By CEO Bazzano's own admission, the Company hired new employees for the glass division at or about the same time it laid off seven aluminum department employees. His excuse that he needed permanent employees to augment the glass division is unconvincing,[75] not to mention being rather callous.

Motive can seldom be proved by direct evidence. Here the circumstantial evidence is compelling that the circumstance which prompted the Company to change from its announced intention to temporarily transfer aluminum division employees to other jobs in the plant to a surprise layoff was the involvement of six of the seven aluminum division employees in a newly started union organizing drive. There is strong evidence that Benjamin Claypool learned of the union organizing activity soon after it started, and suspected that Smith, Kijowski, and Dosch, three of the employees laid off on October 6, 1988, were involved in distributing union authorization cards.

It was no mere coincidence that six of the seven employees laid off on October 7 had signed union authorization cards, and that five of them had attended the initial union meeting on September 30, 1988, and were active in the union organizing campaign which was just getting started. The Company made no pretense of neutrality, but immediately made its opposition to a union known to its employees. The timing of the layoff, which coincided with the beginning of a union organizing campaign among its employees and involved at least four of the principal solicitors of union authorization cards and most outspoken union sympathizers, rather strongly points to the conclusion that the layoff and the union organizing campaign were connected. The layoff was motivated by the Company's desire to cut short the union organizing drive and intimidate its employees into not supporting the union.

Moreover, whatever may have been Bazzano's reason for laying off the seven employees, he admitted that involvement in union activities was a factor he considered in determining which employees to recall first, and that he discriminated against three of the employees because he believed that they were actively soliciting support for the Union from other employees. That discrimination, standing alone, is a violation of the Act.

It is well established that layoff of employees because of activities on behalf of labor organization violates Section 8(a)(3) and (1). *Hambre Hombre Enterprises v. NLRB*, 581 F.2d 204 (9th Cir. 1978). The Respondent has not met its burden under *Wright Line* of overcoming the General Counsel's prima facie case by proving that it would have laid off the employees at the time it did in the absence of the union activities of at least six of the seven employees who it laid off. Accordingly, I find that Respondent violated Section 8(a)(1) and (3) of the Act by laying off the seven employees, and by failing to recall employee Mark Kijowski until January 14, 1989, and failing to recall employees Brion Smith and Kevin Dosch, at all.

c. *Transferring Tracy Reuter*. On February 27, 1989, Tracy Reuter, a laminator in the glass division, was transferred from plant 1 (the Freeport plant) to plant 2 (the West Kittanning plant), where she remained until a week-and-a-half later she was transferred back to plant 1. The General Counsel contends that she was transferred because she was a union supporter and wore a union T-shirt. The Respondent argues that she was transferred because the only person on her crew who was not a union supporter was being harassed, and something had to be done about it. The Respondent concedes, however, that at the time of the transfer, there was no proof that she was to blame for the harassment.

Tracy Reuter, a 3-year employee of Dlubak Corporation, was a member of Tina Goodgasell's team in the lamination department. On February 27, 1989, her mother received a telephone call from Ben Claypool, during which he left the message that Tracy Reuter had been transferred to the West Kittanning plant. She testified that when she asked Claypool why she had been transferred, he told her it was because she was boisterous and her crew was always goofing off. He also told her that the transfer would not have happened if she, and, apparently other members of her crew, had not worn union T-shirts. She said that he told her that she knew the way Dlubak Corporation was run, and if she did not like it she should find another job. She stated that the first time she wore a union T-shirt was the night before the election, and that the only members of her crew who did not wear union T-shirts were Tina Goodgasell, her crew chief, and Lisa Minteer.

Reuter also testified that Claypool told her that her crew chief, Tina Goodgasell, had agreed with her transfer. Reuter said that when she asked Goodgasell if that was true, she denied it.

Reuter stated that she heard that someone put a razor in Lisa Minteer's hardhat. She denied any knowledge of the event. She said that Ben Claypool told her that she did not get along with other crew members, and there was bickering back and forth.

David Bazzano testified that he decided to transfer Reuter to plant 2, because Ben Claypool had reported to him that there was horseplay on her shift when management was not there, and that someone had cut another employee's hat with a razor and put razors in the fingers of an employee's gloves. Bazzano stated that Claypool mentioned that Reuter was on

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spondent's well-established antiunion animus, is sufficient to support the inference that it laid off one or two employees whose union activities were not known, in order to reach at least four of the principal union organizers, with higher seniority, whose union activities were open and unconcealed.

[74] The comparisons of the number of hours worked in 1988 with hours worked by employees the year before is inconclusive. The question here is not whether good economic reasons existed for a layoff, but whether the layoffs were meant to be an object lessons to the Company's employees that it did not pay to support the Union.

[75] Especially since several of the laid-off employees had previous experience in the glass division.

the shift, and that she might or might not have been involved in that activity. Bazzano stated that Reuter only worked at plant 2 for a short time, and that she did not lose any pay or benefits. While at plant 2, she did construction work. At plant 1 she had been a laminator. Bazzano denied that her transfer had anything to do with her support for the Union.

Bazzano further stated that within the same timeframe, Lisa Minteer was transferred to another shift, because she was the subject of a lot of criticism for holding different views from most of the others on her shift. Bazzano said that he had not heard of any further trouble on Reuter's shift after she returned from plant 2.

Benjamin Claypool testified that Lisa Minteer had complained about her treatment because she was the only member of her crew who was not for the Union, and asked to be put on another crew. She complained that someone had put razor blades in her glove. Claypool stated that in order to put a stop to that activity, he transferred Tracy Reuter, who was a boisterous person, to plant 2. He acknowledged that he had no proof that she had done anything. He denied having the conversations which Reuter testified he had with her.

It is evident that the impetus for Reuter's transfer came from Benjamin Claypool, and Bazzano did little more than approve of his decision. It is also clear that Claypool selected Reuter for transfer because he considered her to be boisterous, and she was a known union supporter. I do not find Claypool to be a credible witness insofar as his antiunion activities are concerned. His actions in this instance are entirely consistent with his antiunion bias and his persistent harassment and intimidation of union supporters.

In this instance, by his own admission, Claypool singled out a union supporter for punitive action without any evidence that she had been guilty of any misbehavior, other than being boisterous.

Respondent admitted in its answer to the complaint that Tracy Reuter's transfer was a mandatory subject for the purpose of collective bargaining, and that transferred Reuter without prior notice to the Union and without affording the Union an opportunity to negotiate and bargain as the exclusive bargaining representative of the employees in the appropriate unit for collective-bargaining purposes.

By transferring Reuter to another plant, over her objections, for no other reason than she was a union supporter, Respondent discriminated against her, and in doing so violation Section 8(a)(1), (3), and (5) of the Act.

d. *Bonuses of $500 and $50*. It is undisputed that Respondent paid its employees bonuses of $500, on or about October 13, 1988, and $50, on or about February 16, 1989.

The General Counsel contends that in the absence of a business reason justifying the awarding of a $500 bonus to its employees only 8 days after the earliest notice the Company could have had of the union organizing campaign, the timing of the bonus and the unusually high amount compel a finding that the Respondent, by its apparent largesse, was attempting to dissuade its employees from supporting the Union. Respondent contends that the decision to pay the bonus had been made in July 1988, months before the union organizing campaign began, and that payment was made as soon as possible after September 30, 1988, the close of the fiscal year.

The General Counsel further contends that the payment of the $50 bonus on February 16, 1989, constituted an implied reward for voting against the Union, and that it was a mandatory subject for collective bargaining. Respondent contends that the bonus was paid after the election, and was consistent with the Company's practice of rewarding its employees for good fiscal year quarters. Respondent admitted in its answer to the complaint that the $50 bonus was a mandatory subject for collective bargaining, and that it granted the bonus without prior notice to the Union and without affording the Union an opportunity to negotiate and bargain as the exclusive representative of its employees in the appropriate unit for collective-bargaining purposes.

In the course of this case, the General Counsel served a subpoena for financial records on Respondent, including records of revenue and profit or loss for the fiscal years ending September 30, 1986, September 30, 1987, and September 30, 1988. Respondent refused to comply with the subpoena, arguing that the payments of the two bonuses (the $500 bonus paid on October 13, 1988, and a $50 bonus paid on February 16, 1989) were not within the critical period, and disclosure of information concerning profitability could be used against the Company by its competitors or the Union. I found the information requested in the subpoenas to be relevant and not burdensome, and I issued a protective order restricting the General Counsel from disclosure outside of the NLRB of financial information provided by the Respondent in compliance with the subpoena. It is undisputed that Respondent thereafter continued to refuse to comply with the subpoena.

The parties entered into a stipulation at the hearing that the Respondent would not offer any financial justification for granting the $500 bonus. Likewise, it was stipulated that the Respondent would not offer any evidence indicating a financial justification for granting its employees a $50 bonus, on February 16, 1989. The parties agreed that the General Counsel and the Charging Party may argue that an adverse inference should be drawn against Respondent because it failed to turn over, as ordered, the financial information requested in the subpoena.[76]

The General Counsel urges that because of Respondent's failure to comply with the subpoena for financial information, an adverse inference should be drawn against the Respondent that ''the documents, if produced would not support any defense advanced by Respondent, but would support counsel for the General Counsel's contention that Respondent granted the bonuses to dissuade its employees from supporting the Union.''

I find that the Respondent's failure to comply with the General Counsel's subpoena for financial information is unexcused. Accordingly, I hereby grant the General Counsel's request that an adverse inference be drawn against the Respondent that Respondent had no financial justification for granting the two bonuses.

Testimony by Dlubak employees established that the Respondent had in the past made a practice of paying its employees bonuses once or twice a year,[77] usually in the sum-

[76] Pursuant to the stipulation, Respondent withdrew testimony by CEO David Bazzano that the $50 bonus was related to the Company's revenues.

[77] Respondent argued that it had in the past paid a series of small bonuses of $25 to $50, four times a year; however, there is little evi-

mer and at Christmastime.[78] The bonuses ranged from $20 to $100.

CEO David Bazzano testified that he participated in the decision, made in July 1988, well in advance of the union organizing campaign, to pay the employees a $500 bonus as soon as possible after the end of the fiscal year, September 30, 1988. Bazzano said he had no knowledge of a union's attempt to organize the plant at that time, and the Company did not pay the bonus of $500 in October 1988 for any reason related to the union organizing campaign.

Bazzano stated that in early to mid-February 1989, he decided, with Frank Dlubak's authorization, to pay the employees a bonus of $50. He stated that he made the decision a week to a week and a half before it was paid. He further stated that General Counsel's Exhibit 51 is a letter describing why the Company paid its employees a $50 bonus in February 1988.[79] Bazzano explained that his reasons for paying the bonus were that despite the tensions created by the unionization campaign, in which there was a large group of employees against the Union, and a group for the Union, the employees worked hard, did a good job, and got things done, resulting in a very good quarter.

An employer's grant of benefits during an organizational campaign may be an unlawful interference. In *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678, 686 (1944), the Supreme Court said: ''The action of employees with respect to the choice of their bargaining agents may be induced by favors bestowed by the employer as well as by his threats or domination.'' The Supreme Court, in *NLRB v. Exchange Parts Co*., 375 US 405, 409 (1964), said that the danger is in the timing of increases and benefits:

> The danger inherent in well-timed increases and benefits is the suggestion of a fist inside a velvet glove. The employees are not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged.

In *Crown Tar & Chemical Works v. NLRB*, 365 F.2d 588, 590 (10th Cir. 1966), the court said the ''granting of economic benefits by the unilateral action of an employer while union organizational efforts are underway, or while a representation election is pending, is a violation of Section 8(a)(1) and 8(a)(5) of the Act.'' The Board, however, has said that the ''granting of benefits during an election campaign is not per se unlawful where the employer can show that its actions were governed by factors other than the pending election.'' *American Sunroof Corp*., 248 NLRB 748 (1980). Among the factors which the Board will consider in determining whether an employer's grant of benefits during an organizational campaign was unlawful interference are whether the employer had previously told the employees of the benefit change, and whether the benefit change was consistent with the employer's past practice. *Crown Tar & Chemical Works v. NLRB*, supra; *Automated Products*, 242 NLRB 424 (1979).

The Board's standard in preelection benefit cases is an objective one. As stated by the Board in *B & D Plastics*, 302 NLRB 245 (1991):

> To determine whether granting the benefit would tend unlawfully to influence the outcome of the election, we examine a number of factors, including: (1) the size of the benefit conferred in relation to the stated purpose for granting it; (2) the number of employees receiving it; (3) how employees reasonably would view the purpose of the benefit; and (4) the timing of the benefit. In determining whether a grant of benefits is objectionable, the Board has drawn the inference that benefits granted during the critical period are coercive. It has, however, permitted the employer to rebut the inference by coming forward with an explanation other than the pending election, for the timing of the grant or announcement of such benefits. [Citations omitted.]

In *B & D Plastics*, supra, 2 days before an election, the employer granted its employees a paid day off, no strings attached, and held a cookout at which it delivered the final message in its antiunion campaign. The Board found that the employees, including those who elected not to attend the cookout, received a substantial bonus because of the upcoming election, and could reasonably have viewed the employer's actions as an attempt to influence their votes in favor of the employer's position. That, the Board said, was sufficient to require that the election be set aside, unless the employer came forward with a ''persuasive business justification for granting the benefit when it did.'' The Board went on to find that the employer's asserted business justification, that the cookout was necessary as a means to gather all three shifts together, was insufficient to warrant a different result. The Board said that the employer's ''business justification'' had little or nothing to do with ''business,'' but amounted only to a claim that the paid day off and cookout were the most effective way to influence the election in its favor.

In this case, there is no evidence to corroborate CEO Bazzano's claim that the $500 bonus had actually been decided upon by the Company several months before the union campaign started, or that it had been previously announced.[80] Further, the $500 bonus was significantly greater than the amounts it had paid in bonuses in the past. It appears that Respondent had not previously awarded bonuses during the fall of the year, and that the bonuses which it had previously given to its employees, were considerably smaller. The $500

dence to corroborate that argument. In any event, it appears to be undisputed that Respondent had not in the past given a bonus to its employees in the amount of $500.

[78] There is testimonial evidence that the Respondent also gave its employees a $25 Christmas bonus in December 1988, the same amount it had given its employees in December 1987. The General Counsel has not advanced an argument that this bonus, if indeed there was one, violated the Act.

[79] The letter is addressed: ''To: All Employees,'' ''From: Frank,'' ''Date: February 16, 1989.'' CEO Bazzano testified that he signed the name, ''Frank,'' with Frank Dlubak's approval. The text of the letter is as follows:

> I realize that over the past few months there have been some tense moments here at our company. I want to congratulate all of you who have put your personal feelings aside and continued to do your jobs well in the face of this turmoil. Keep up the good work, and again thank you one and all.

[80] This case is distinguishable, therefore, from *Huttig Sash & Door Co*., 300 NLRB 93 (1990), in which the Board found that announcement during a union campaign of a previously unannounced, but existing, benefit did not violate Sec. 8(a)(1).

bonus, it appears, was much larger than any previous bonus by a multiple of as much as five times. For these reasons, I do not credit Respondent's explanation for awarding to its employees an abnormally large bonus within a matter of approximately 2 weeks after a union campaign started.

The potential impact on the employees created by paying a substantial bonus at the commencement of a union organizational campaign is evident. Whether intended by the Respondent or not, by virtue of the timing of the substantial, previously unannounced bonus, the employees could hardly miss the message that the source of their benefits was the Company, not the Union. Not only was the $500 bonus excessive in relation to previous bonuses, and paid shortly after the start of a union campaign, it also was paid shortly after the Respondent had summarily discharged one employee for actively supporting the Union, and laid off a group of union supporters, including several of the most active union supporters. As stated by the Board in *Crown Zellerbach Corp*., 225 NLRB 911, 913 (1976),

> [I]t is not always necessary for an employer to shout from the rooftops its power and willingness to reward or punish employees depending on their response to a union campaign. Indeed, we are satisfied that only a remarkably obtuse employee would fail to see in this Respondent's grant of benefits and nearly simultaneous discharge of a leading union proponent the proverbial ''fist inside a velvet glove.'' *N.L.R.B. v. Exchange Parts Company*, 375 U.S. 405, 409 (1964).

The adverse inference which I draw from the Respondent's unlawful refusal to comply with the General Counsel's lawful subpoena for financial information is that there was no increase in the Respondent's gross revenues or profits which would support the payment to its employees of a bonus in the order of magnitude of perhaps as much as five times the amount of any previous bonus. Although CEO Bazzano claimed that the decision to the pay the bonus was made months before the start of the union organizational campaign, as noted, there is no evidence to support that assertion. To the contrary, the evidence indicates that the payment of the $500 bonus was a radical departure from Respondent's previous practices, both in terms of the amount of the bonus, which was disproportionately large compared to any previous bonus, and in terms of the time of year when the Respondent had previously paid much smaller bonuses.

Implicit in the testimony of CEO Bazzano concerning the February 16, 1989, bonus of $50 is that, indeed, it was related to the union organizational campaign. Although the election had been held, the results were inconclusive, and all employees knew that the question of whether or not the Charging Party Union would be the employees' bargaining agent was far from settled. CEO Bazzano offered the explanation that he meant the bonus to be a reward to all the employees for working hard despite the tensions created by the divisive election campaign. Viewed from the employees' perspective, however, the bonus could reasonably be considered as a reward for not selecting the Union as the employees' bargaining agent, and a reminder of the benefits that the Respondent had in its power to bestow in the future.

Even viewed in the light most favorable to Respondent, the award of the $50 postelection bonus was a benefit related to job performance, and, as conceded by Respondent in its answer to the complaint, was a mandatory subject of bargaining. *Boise Cascade Corp*., 304 NLRB 94 (1991).

I find, therefore, that Respondent had no ''business justification'' for the two bonuses which, in fact, had little or nothing to do with ''business.'' Instead, the bonuses amounted only to a transparent attempt by the Respondent to convince its employees that it, and not the Union, was the source of any benefits which they might expect to receive. The evidence does not support the Respondent's argument that there was ''persuasive business justification for granting the benefit[s] when it did.'' *B & D Plastics*, supra. It is a reasonable inference which the employees were not likely to miss that the $500 bonus, in October 1988, and the $50 bonus, in February 1989, were intended by the Respondent to influence them not to select the Union as their bargaining agent. As such, the bonuses interfered with the employees' exercise of their Section 7 rights, in violation of Section 8(a)(1) and (3), and, with respect to the $50 bonus, Section 8(a)(5) of the Act, because the Respondent failed to bargain with the Union as the exclusive representative of its employees in the appropriate bargaining unit for collective-bargaining purposes.

e. *Written warning issued to Bruce Offredi*. On November 9, 1988, employee Bruce Offredi received a written warning from Plant Manager Benjamin Claypool for defacing company property. The General Counsel asserts that the basis for the written warning was Offredi's display of a union insignia on his hardhat, and, therefore, the written warning violated the Act. The Respondent admitted in its answer to the complaint that Plant Manager Claypool issued a written warning to Offredi on November 9, 1988, but denies any violation of the Act.

The Respondent requires its employees working on the production floor to wear a hardhat, which, apparently the Respondent furnishes. On November 9, 1988, Plant Manager Claypool told employee Bruce Offredi to remove the words, ''Solidarity'' and a union pin from his hardhat. Offredi initially refused, then after some argument, and a threat by Claypool to write him up for having an argument, complied with Claypool's order. Claypool told him to consider the incident a verbal warning, and left. A short time later, he returned and handed Offredi a written warning for defacing company property. Other employees testified that they regularly decorated their hardhats with stickers or words, and were never told by Respondent to remove them.

CEO David Bazzano testified that he learned the next day that Claypool had given Offredi a written warning for defacing his hardhat. Bazzano said that there was no reason to give Offredi a written warning for that, and that he had instructed Claypool to take it out of Offredi's file, and to ''throw it away.'' Bazzano said that it was company policy to allow the employees to put anything they wanted on their hardhats. He stated that he did not know if his instructions to Claypool were ever communicated to Offredi.

There is no question that Claypool exceeded his authority by selectively issuing the written warning to Offredi for defacing his hardhat by wearing a union pin and a union slogan on it. Claypool singled out for punishment one individual, from among others who decorated their hardhats with personal stickers or words, for wearing union paraphernalia on

his hardhat. His action was discriminatory, and serves to further demonstrate his antiunion attitude.

The chief executive officer of the Company, David Bazzano, testified that the Company had no policy against employees putting anything they wanted on their hardhats, and ordered Claypool to remove the warning from Offredi's file. Bazzano, however, acted after the fact, and his action was ineffective in dissipating the impact of the written warning on Offredi and other employees. Claypool, as plant manager, had the apparent authority to bind his employer by his actions. Bazzano's after-the-fact disavowal of Claypool's action, even if communicated to Offredi and other employees, was too late to undo the chilling impact of Claypool's reprisal against Offredi for exercising his Section 7 rights. At best, Bazzano's disavowal is no more than a mitigating factor.

Citing *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945), the Board stated in *Burger King Corp*., 265 NLRB 1507 (1982), enforced in part and denied in part 725 F.2d 1053 (1984), that ''[i]t is well settled that, in the absence of special circumstances, an employee's wearing a union button at work is a protected activity under Section 7 of the Act.'' In this case, there is no issue of ''special circumstances,'' because the chief executive officer of the company testified that it is the Respondent's policy to allow employees to wear anything they wanted on their hardhats.

The Respondent, through its chief executive officer, having denied that the Company had any rule against employees putting the word ''solidarity'' or a union pin on their hardhats, Plant Manager Claypool's issuance of a written warning to employee Bruce Offredi for defacing company property in that manner interfered with Offredi's exercise of his Section 7 rights, and violated Section 8(a)(1) and (3) of the Act.

III.

a. *Unit determination*. On October 24, 1988, the Union filed a petition for certification as the representative of all Dlubak Corporation's production and maintenance employees for collective-bargaining purposes. In a Stipulated Election Agreement, dated November 14, 1988, signed by David S. Bazzano, for the employer, Attorney R. Michael LaBelle, for the Union, and Board Agent Ronald A. Kisak, the appropriate collective-bargaining unit was defined as:

> All full-time and regular part-time production and maintenance employees employed by the Employer at its Freeport, Pennsylvania, and Kittanning, Pennsylvania, facilities; excluding office clerical employees and guards, professional employees and supervisors as defined in the Act.
>
> The parties hereby agree that inasmuch as there is a dispute with respect to the eligibility of employees employed in Shipping/Receiving/Purchasing Clerk, Aluminum Bending Coordinator and Glass Bending Coordinator classification these employees will vote subject to challenge.

Sometime in November 1988 the Union and Respondent signed the Stipulated Election Agreement, the Union and the Respondent signed a stipulation (G.C. Exh. 88) listing the names of the Dlubak Corporation employees ''who were agreed to be included or excluded from the list of employees eligible to vote'' in the January 12, 1988 election.[81] There are a total of 69 names included on the list of employees eligible to vote, and 26 names on the list of employees excluded from voting.

At the hearing, the parties to this proceeding stipulated that General Counsel's Exhibit 55, which is entitled ''Dlubak Corporation Payroll, November 20, 1988,'' ''accurately reflects the complete employee complement employed by Respondent on November 20, 1988, in the job classifications contained in the unit description found in paragraph 26 of the complaint.''[82] The parties stipulated that the status of 11 of the employees whose names are on the payroll list is disputed, but, there is no dispute that the remaining (69) employees were employed in the bargaining unit.[83] However, the parties further stipulated that three of the employees listed on General Counsel's Exhibit 55 terminated their employment with Dlubak Corporation before January 12, 1988, the day of the election. They are Nicholas G. Relich, whose last day of employment was November 20, 1988; Gloria J. Young, whose last day of employment was December 21, 1988; and, Georgia A. Shernock, whose last day of employment was December 27, 1988. The parties also stipulated that no new employees were hired between November 20, 1988, and January 12, 1989. Thus, the parties agree that as of December 27, 1988, the date Georgia A. Shernock's employment ended, at least 66 employees were members of the appropriate unit and were eligible to vote in the election held on January 12, 1989, and disagree on the status of 11 other employees.

Following are the names, and the job assignments, of the 66 employees whose inclusion in the bargaining unit as of December 27, 1989, is not disputed:

Ann Marie Bartoe—Lamination
Kirk A. Bauer—Glass Production
Michael R. Bauer—Glass Production
Robert A. Beale—Lamination
Rena L. Bellotti—Lamination
Sandra L. Berry—Lamination
Charles E. Booher—Glass Production
Kenneth W. Bowser—Glass Production
Robert L. Bowser—Aluminum
Arthur Brendlinger—Maintenance
Richard J. Charney—Maintenance
Gregory L. Claypool—Glass Production
Harriet A. Collar—Lamination
Jeffrey W. Copeland—Aluminum
Barbara A. Cousins—Lamination
James E. Cravener—Glass Production
Elaine Crissman—Lamination

[81] The stipulation (G.C. Exh. 88), which is signed by CEO Bazzano for the Respondent and Attorney LaBelle for the Union, is undated. There appears to be no dispute, however, that it was signed in November 1988.

[82] The document was prepared by Respondent. It is not Dlubak Corporation's complete payroll, and includes the name of William Plunkard, who had been fired in October 1988, and was not on Dlubak Corporation's payroll as of November 20, 1988.

[83] Not included on the list are the names of two employees, Mark Livengood and Richard Anthony, whose ballots were challenged by the Respondent. The parties stipulated that these two employees were terminated prior to the election, and that the Respondent's challenges should be upheld.

Greg S. Crissman—Glass Production
David A. Crotallo—Glass Production
Frank D. Cushey—Glass Production
Kevin M. Dosch—Aluminum
Donald Lee Emery—Glass Production
Dirk A. Fennell—Glass Production
Todd A. Fennell—Glass Production
Robert K. Fox—Maintenance
Michael J. Ferotte—Glass Production
C. J. Goodgasell—Lamination
Mark R. Gorog—Aluminum
Dana Lynn Hagofsky—Lamination
Rhonda S. Hartman—Lamination
Gary H. Heigley—Glass Production
James S. Hudek—Glass Production
Randy Lee Johns—Aluminum
Mark A. Kijowski—Aluminum
Nicholas J. Kuchta—Aluminum
Bradley N. Kuhn—Glass Production
Douglas J. Leipertz—Glass Production
Ronald M. Lowry—Glass Production
Phyllis Lubiniecki—Lamination
James R. McAfoose—Glass Production
Stephen D. Meleason—Aluminum
John J. Milligan—Glass Production
Kathy Ann Milligan—Lamination
Lisa M. Minteer—Lamination
James H. Mitchell—Aluminum
Bruce A. Offredi—Glass Production
John A. Osche—Glass Production
Todd A. Placek—Glass Production
David C. Plunkard—Glass Production
Connie S. Reed—Glass Production
Tracy D. Reuter—Lamination
Francis K. Righi—Glass Production
Glenn S. Ross—Aluminum
Randy L. Ross—Glass Production
David C. Schuey—Glass Production
Francine J. Schaffer—Lamination
Keith C. Shaffer—Glass Production
Ronald A. Shankle—Glass Production
Thomas Paul Shankle—Glass Production
Brion D. Smith—Aluminum
Jeffrey S. Snyder—Aluminum
Janet L. Toy—Lamination
John J. Valasek, III—Glass Production
Ronald T. Vantine—Aluminum
Jimmy D. Walker—Lamination
Fred A. White—Maintenance.

The employees whose status is in dispute are:[84]

*Timothy S. Ballas—Glass Production
*Kathy Claypool—Purchasing, Shipping/Receiving
Thomas Ellenberger—Glass Production
*Barbara J. Fratta—Customer Service, Aluminum
Glenn E. Livengood—Glass Production
*Nancy Noroski—Customer Service, Glass Production
*William Plunkard—Glass Production
*W. B. Ruppersberger—Glass Production
Timothy A. Shirley—Glass Production
Gary S. Slee—Glass Production
Joseph F. Visnovsky—Glass Production

Of these employees, the General Counsel argues that only William Plunkard was a member of the bargaining unit. The Respondent disputes that William Plunkard was a member of the bargaining unit, and asserts that the remaining 10 employees were included in the bargaining unit.[85]

Comparison of the names on General Counsel's Exhibit 55, the November 20, 1988 payroll, and General Counsel's Exhibit 88, the prehearing stipulation of names of employees included or excluded from the list of employees eligible to vote, discloses that General Counsel's 88 does not include all of the names appearing on General Counsel's Exhibit 55. Further, neither General Counsel's Exhibit 55 nor General Counsel's Exhibit 88 is identical to the *Excelsior* list (G.C. Exh. 89) supplied by the Respondent for the payroll period ending November 12, 1988.

Listed on General Counsel's Exhibit 55, but not on General Counsel's Exhibit 88, are the names of Lisa M. Minteer, Timothy Ballas, Kathy Claypool, Barbara Fratta, Nancy Noroski, William Plunkard, and W. B. Ruppersberger. Except for Lisa Minteer, the status of all of these employees is in dispute. The name of Lisa Minteer is also missing from General Counsel's Exhibit 89, the *Excelsior* list. Listed on General Counsel's Exhibit 88, but not on General Counsel's Exhibit 55, is the name of Lisa Meyer. All the names listed in the included column on General Counsel's Exhibit 88 also appear on General Counsel's Exhibit 89. In addition, General Counsel's Exhibit 89 also contains the names of Timothy Ballas, Kathy Claypool, Barbara Fratta, Nancy Noroski, and W. B. Ruppersberger, none of which appear on General Counsel's Exhibit 88, either in the included or excluded column.

The General Counsel, citing *Norris-Thermador Corp*., 119 NLRB 1301 (1958), argues that the Board will respect a written preelection agreement that is expressly made final and binding as to specified questions of eligibility, unless it is contrary to the Act or Board policy. It is the General Counsel's position, then, that since employees Ellenberger, Shirley, Reed, Slee, and Visnovsky were excluded from voting by General Counsel's Exhibit 88, the preelection stipulation, they should be excluded from the bargaining unit for the purpose of determining a majority. Respondent, citing *Westlake Plastics Co*., 119 NLRB 1434, 1436 (1964), argues that it is contrary to the Act and Board policy to exclude probationary employees, such as Ellenberger, Shirley, Reed, Slee, and Visnovsky. Therefore, Respondent urges that these employees, whose names appear on General Counsel's Exhibit 55 (and Jt. Exh. 1), should be included in the bargaining unit.

The preelection stipulation in the instant case does not meet the criteria set out in *Norris-Thermador Corp*., supra, which must be met before the Board will consider a preelection agreement to be a final determination of eligibility issues. In *Norris-Thermador Corp*., supra, 119 NLRB at 1302, the Board concluded that,

[84] The names of those employees who voted in election on the January 12, 1989, are preceded by an asterisk (*).

[85] Of these employees, the following voted in the election and their ballots are challenged: William Plunkard, Timothy Ballas, Fred Ruppersberger, Kathy Claypool, Nancy Noroski, and Barbara Fratta.

> where the parties enter into a *written* and signed agreement *which* expressly provides that issues of eligibility resolved therein shall be final and binding upon the parties, the Board will consider such an agreement, and only such an agreement, a final determination of the eligibility issues treated therein unless it is, in part or in whole, contrary to the Act or established Board policy. [Emphasis in original.]

Here, there is no provision in the preelection stipulation expressly providing that it is to be final and binding upon the parties.

Indeed, in this proceeding, the General Counsel seeks no more than selective enforcement of the preelection stipulation, clearly negating the proposition that the stipulation is a final and binding determination of eligibility issues. Relying upon the determination contained in the preelection stipulation excluding employees Ellenberger, Reed, Shirley, Slee, and Visnovsky, the General Counsel argues that they should not be counted as members of the bargaining unit. But, the General Counsel also argues that Glenn E. Livengood should not be included and counted, although his name appears in the included list in the preelection stipulation, and William Plunkard should be included in the bargaining unit, despite the fact that his name does not appear at all in the preelection stipulation. Missing entirely from General Counsel's Exhibit 55, without any evidence of record to explain her absence, is the name of Lisa Meyer, whose name appeared on the eligible list in General Counsel's Exhibit 88. By failing to object to Lisa Meyer's absence from General Counsel's Exhibit 55, it appears that the General Counsel and the Union accept the fact that she was not a member of the bargaining unit at the time of the election. Thus, the General Counsel takes the inconsistent position that the preelection determination of eligibility contained in the preelection stipulation is final only as to some employees.

Neither on its face, nor in its implementation as sought by the General Counsel and the Charging Party, does the preelection stipulation in this case meet the *Norris-Thermador* criteria for enforcement as a final determination. Accordingly, I find that the preelection stipulation does not constitute a final, binding determination of the eligibility of employees Ellenberger, Reed, Shirley, Slee, and Visnovsky.

In any event, the preelection stipulation has been superceded by the stipulation into which the parties entered during the hearing concerning which employees should be included in the bargaining unit, and, thus, were eligible to vote in the election, and those employees whose status is in dispute. The parties agreed that 66 employees were includable in the bargaining unit, and disagreed on the status of 11 more employees. The status of those employees whose status is disputed remains to be determined. By agreement by the parties, the maximum possible size of the bargaining unit as of January 12, 1989, was 77 employees.

The name of Connie Reed appears on General Counsel's Exhibit 55, the November 20, 1988 payroll list (G.C. Exh. 55). It also appears on General Counsel's Exhibit 88, the preelection stipulation, as an excluded employee. The parties did not stipulate that she was one of the employees on General Counsel's Exhibit 55, the November 20, 1988 payroll list, whose status is in dispute. The General Counsel, however, now contends that she, too, should be excluded from the unit, because the evidence shows that her employment status was the same as that of Ellenberger, Shirley, Slee, and Visnovsky, all of whom the General Counsel argues should be excluded from the unit based on the parties' preelection agreement.

In a recent case, *R. H. Peters Chevrolet*, 303 NLRB 791, 792 (1991), the Board said that in a stipulated-unit election, its function is ''to ascertain the parties intent with regard to disputed employees,'' and ''if the intent is unclear or the stipulation ambiguous, then community-of-interest principles come into play.'' The Stipulated Election Agreement in this case specifically includes ''all full-time and regular part-time production and maintenance employees,'' and specifically excludes ''office clerical employees and guards, professional employees and supervisors as defined in the Act.'' The parties could not agree in the stipulation on the eligibility of employees employed as shipping/receiving/purchasing clerks, aluminum bending coordinator, and glass bending coordinator. Therefore, whether or not employees in these positions belong in the unit must be determined by using community-of-interest principles.

An appropriate bargaining unit involving previously unrepresented employees is one made up of employees who share a community of interest, that is, employees who share a common interest in wages, hours, and other conditions of employment. ''In defining bargaining units, its [the Board's] focus is on whether the employees share a 'community of interest.''' *NLRB v. Action Automotive*, 469 U.S. 490, 494 (1985). In *Kalamazoo Paper Box Corp*., 136 NLRB 134, 137 (1962), a case involving unit severance, the Board discussed factors to be considered in determining whether employees lack a sufficient community of interest to group them together for purposes of collective bargaining:

> Factors which warranted consideration in determining the existence of substantial differences in interests and working conditions included: a difference in method of wages or compensation; different hours or work; different employment benefits; separate supervision; the job functions and amount of working time spent away from the employment or plant situs . . .; the infrequency or lack of contact with other employees; lack of integration with the work functions of other employees or interchange with them; and the history of bargaining.

In *R. H. Peters Chevrolet*, supra, the Board found a sufficient community of interest existed between service advisors and mechanics employed by an automobile dealership, where they worked under the same supervision, they were required to take the same yearly examination, they worked together in preparing estimates, sometimes mechanics substituted for absent service advisors and one mechanic had previously been employed as a service advisor, service advisors and mechanics took turns working on Saturdays, incomes for both types of employees potentially could vary, and they received the same health benefits. The fact that service advisors sometimes gave work orders directly to mechanics, and could request mechanics to redo work or work overtime, did not disqualify service advisors from inclusion in the unit.

Thus, among the factors which the Board has looked at in determining whether a community of interest exists are similarity in method of computation of wages or compensation,

hours of work, job functions, employment benefits, common supervision, and whether there is frequent contact with other employees and integrated work functions, or whether there is a prior history of bargaining together.

Thomas Ellenberger, Timothy A. Shirley, Gary C. Slee, Joseph V. Visnovsky, and Connie S. Reed. The evidence indicates that Ellenberger, Reed, Shirley, Slee, and Visnovsky were newly hired production employees in the glass division in November 1988.[86] It was the Company's practice to classify new production employees as part-time employees during a 90-day probationary period, even though they worked full-time hours and performed the same duties as other production employees with similar jobs. As Respondent points out, regular part-time employees are includable in a bargaining unit. However, this case is distinguishable from *Westlake Plastics Co*., supra, cited by Respondent, because here part-time employees were not excluded as a group by the stipulated election agreement.

Having entered into a stipulation which includes Connie Reed as a member of the bargaining unit, counsel for the General Counsel may not now selectively disavow part of the stipulation, and take a position inconsistent with the stipulated facts at the hearing. Accordingly, I find that employee Connie Reed was a member of the unit on November 20, 1988, and remained so through March 14, 1989, and, thus was eligible to vote in the election of January 12, 1989.

There is no question but that these five part-time employees fact share a community of interest with the other 66 employees who are undisputed members of the bargaining unit. These five employees, Connie S. Reed (glass production), Thomas Ellenberger (glass production), Timothy A. Shirley (glass production), Gary C. Slee (glass production), and Joseph F. Visnovsky (glass production), differ from the other glass production employees only in that they were new employees working during a 90-day probationary period. Their method of pay (hourly), benefits, duties, supervision, working conditions, and hours of work were no different than those of the other glass production employees. The only basis raised for excluding them from the bargaining unit is that four of them, Thomas Ellenberger, Timothy A. Shirley, Gary S. Slee, and Joseph F. Visnovsky, were not included in the preelection stipulation. As previously stated, I find that the preelection stipulation is not determinative of the composition of the bargaining unit. It is well established that regular part-time employees are includable with regular full-time employees in a collective-bargaining unit. Accordingly, I find that these employees should be included in the bargaining unit. Adding employees Ellenberger, Shirley, Slee, and Visnovsky to the 66 employees whose membership in the unit was not disputed by the parties at trial (a list which includes the name of Connie Reed), brings membership in the unit to 70 employees.

William Plunkard. In view of my finding that the Respondent violated the Act by discharging William Plunkard (glass production) because he engaged in union activities, which entitles him to reinstatement and backpay, there is no question but that he should be included in the bargaining unit.

Adding the name of William Plunkard to the roster of bargaining unit employees raises the number of bargaining unit employees at the time of the January 12, 1989 election to 71.

Respondent employs both salaried and hourly wage employees. The difference in the method of computing compensation, however, is not the only significant difference in the benefits and conditions of employment of salaried and hourly workers. The Respondent pays the premium for health insurance covering salaried workers, their spouses, and their families. Hourly workers receive company-paid health insurance only for themselves; they have the option of purchasing supplemental health care coverage for their spouses and families at their own expense. Salaried employees also receive substantially better company-paid life insurance benefits. Hourly employees normally work a 40-hour week of 5 8-hour days, with a paid one-half hour lunch period. When hourly workers work overtime, as, apparently, was often the practice at Dlubak, they receive overtime pay. Salaried employees work an 8-1/2 hour day, which includes an unpaid one-half hour lunch period. Hourly employees work rotating shifts, and are paid for overtime work. Salaried employees do not work rotating shift, and do not receive overtime pay. Hourly workers rotate shifts between the morning or daylight shift, the afternoon or evening shift, and the night shift. Salaried employees work only during daylight hours. Also of significance, it appears that as a practical matter, Respondent limits layoffs to hourly wage workers.

The remaining six employees whose eligibility for inclusion in the bargaining unit is disputed are all salaried employees. The General counsel argues that four of these employees, Timothy Ballas (glass production), Glenn E. Livengood (glass production), Barbara J. Fratta (customer service, aluminum), and W. E. Ruppersberger (glass production), should be excluded from the bargaining unit because they are supervisors and/or lack a community of interest with the other employees who make up the bargaining unit. The General Counsel argues that Nancy Noroski (customer service, aluminum) and Kathy Claypool (purchasing, shipping/receiving) should be excluded because they are office clerical employees and/or do not share a community of interest with the employees who make up the unit. The Respondent denies that these employees are supervisors or office clerical employees, or that they lack a community of interest with the other employees who make up the bargaining unit.

Timothy S. Ballas. Company records list Ballas' department as ''glass supervision.'' Ballas has worked for Dlubak Corporation for 5 years. He received the title of supervisor while working at plant 2 when it was in full production. Since July 1988, he has worked at plant 1, and retains the job title of supervisor. He is a salaried employee. His current duties include quality control. He checks architectural and showcase glass for flaws or deviations from customer specifications. If he is uncertain about a particular piece of glass, he calls Dan Porter or Ben Claypool, both of whom are undisputed statutory supervisors. Ballas also does production work on special or unusual projects, helps load and unload glass trucks, delivers and picks up glass to and from customers and vendors, and delivers glass to job sites. He helps crew chiefs go over paperwork for jobs, resolving any problems or questions that may come up. If there are discrepancies, he gets clarification from Nancy Noroski or Dan Porter. For special jobs, he fills out his own timesheet. His su-

[86] Shirley, Slee, and Reed were hired on October 13, 1988; Visnovsky was hired on October 16, 1988; and Ellenberger was hired on October 17, 1988.

pervisors are Dan Porter and Ben Claypool, and he is allowed use of Dan Porter's office. He supervises other employees assigned to him for special projects. He exercises independent judgment in quality control matters. In the absence of Dan Porter and Ben Claypool, Ballas has substituted as supervisor of the glass employees. He dresses in work clothes. Production employees seem to be unsure of Ballas' position, but they regard him as a person to whom they can go to resolve problems with jobs or paperwork, and they view his decisions as controlling. He does not have authority to hire or fire, or discipline employees. He does not recommend actions affecting the status of employees, such as promotions, transfers, layoffs, or time off. He does not punch a timeclock. He stated that his present position is a promotion from crew chief. If he disagrees with a crew chief on quality control issues, his decision prevails. He works only the day shift, from 7 a.m. to 3 p.m. CEO Bazzano characterized Ballas as a ''key'' employee.

On the basis of his duties, I find that Timothy Ballas is not a statutory supervisor, within the the meaning of Section 2(11) of the Act. However, I also find that he lacks a sufficient community of interest with the hourly production and maintenance employees to be included with them in the same bargaining unit. As a salaried employee, Ballas' interests, both in fact and as perceived by production workers, are more closely related to management than to hourly production workers. He does not share a common interest with hourly workers concerning wages, hours, and other working conditions. There is no similarity in the method by which his compensation is determined, and he receives better benefits than hourly workers. Unlike production and maintenance workers, he does not work rotating shifts, nor does he punch in on a timeclock. His work place is not among the production employees, but in an office which he shares with Dan Porter, an acknowledged supervisor. Further, Ballas, unlike production workers, spends an appreciable percentage of his time away from the plant.

Although Ballas' duties are production related and he reports to the supervisors of the glass division, there are sufficient dissimilarities which, in the aggregate, clearly show that he has little in common with hourly workers. He reports to Dan Porter and Ben Claypool, directly; unlike hourly workers who report to their crew chiefs, who, in turn report to Porter and Claypool. Crew chiefs recognize that Ballas's position is higher than theirs, and his decisions and instructions are binding on them. Ballas spends an appreciable amount of his time away from the plant, unlike production and maintenance employees. When he is at the plant, it appears that he spends part of his time in Dan Porter's office performing recordkeeping duties, and when he has occasion to be in production area, whether performing a specialized production task, himself, performing quality control inspections, or helping crew chiefs with their recordkeeping duties, he has authority to direct the work of crew chiefs and production employees. Whenever Ballas has contact with production employees, it is clear that a superior-subordinate relationship exists. Unlike production workers, he receives a fixed income as a salaried employee, he does not receive overtime pay, and he works only on the daylight shift. He has a degree of independent judgment which hourly workers, including crew chiefs, do not have. Finally, it appears that Ballas does not share with hourly workers the risk of being laid off.

In the absence of a sufficient community of interest with production and maintenance employees, I find that Timothy Ballas should be excluded from the bargaining unit, and was not eligible to vote in the election of January 12, 1989.

Glenn Livengood. Glenn Livengood has been employed by Dlubak Corporation since 1982. He was promoted to supervisor in November 1986, a job title which he still holds. He is a salaried employee, and works only the daylight shift. He does not punch a time clock. He dresses in work clothes. He does not receive overtime pay. Company payroll records list his department as ''glass supervision.'' CEO David Bazzano called him a ''very valuable and key employee.'' Bazzano stated that he would call Livengood a glass supervisor, but he has no official title. Bazzano determines his pay.

Livengood's supervisor is Dan Porter, with whom he shares an office. He has a wide range of duties in the glass division. Every Monday, he goes over the employees' timecards, tallies their hours, determines whether the hours worked by the employee are regular or overtime hours, and turns in that information to the accounting clerk. On Thursdays, he picks up paychecks from the accounting clerk, and distributes them to the employees. Livengood receives job folders from Dan Porter and Nancy Noroski, and, after proof reading them to make sure all necessary information is included, hands them out to the crew chiefs. He attends crew chief meetings, and production meetings attended by the crew chiefs, Marti Patton (in charge of lamination), Dan Porter, Ben Claypool, David Bazzano, Brian Henry, and Dave Passarelli. Livengood makes up employee work schedules, based on instructions he receives from Ben Claypool.

Livengood reviews crew chiefs' daily reports, on which are recorded the jobs the crew worked on, the time spent on each job, and the number of pieces of glass completed. He tallies the hours worked by the crew members, and if they do not total 8 hours for each employee, he asks the crew chief for an explanation. He turns the crew chiefs' report over to Brian Henry.

Livengood fixes furnaces in the absence of maintenance personnel. He also helps unload glass trucks when they arrive, and he fills in for absent glass production workers, when needed. Livengood is also responsible for quality control for the Marvin Windows job.

Livengood does not regularly supervise other employees. He has no authority to discipline employees, or to hire or fire employees. He does not adjust employee grievances. He has no authority concerning making personnel changes, nor does he make recommendations concerning the status of employees. He has no authority with regard to transfers, layoffs, recalls, or rewards.

Glenn Livengood does not meet the criteria to be considered a supervisor under Section 2(11) of the Act. However, as in the case of Timothy Ballas, he also lacks a sufficient community of interest to be included in a bargaining unit with production and maintenance employees. Livengood appears to hold a position between the crew chiefs and the glass division supervisors. He has administrative duties which neither crew chiefs nor production and maintenance workers have. These duties involve checking job folders and assigning jobs to the crew chiefs, resolving production problems encountered by crew chiefs, collecting and totalling em-

ployees' work hours for purposes of preparing the payroll, handing out paychecks, and supervising recordkeeping required of crew chiefs. He also attends production meetings.

He is a salaried employee. He does not share a common interest with hourly workers concerning wages, hours, and other working conditions. There is no similarity in the method by which his compensation is determined, and he receives better benefits than hourly workers. Unlike production and maintenance workers, he does not work rotating shifts, and he does not punch a timeclock. His pay is not subject to fluctuations, depending upon the hours he works. While he has frequent contact with crew chiefs, it appears that he has less frequent contacts with other production and maintenance employees. While some of his duties require him to be on the production floor, where production and maintenance employees work, he shares an office with Dan Porter, where he performs his administrative duties.

Weighing all the factors, including both those which point to a community of interest with production and maintenance employees, and those which do not, it is clear that there are substantial difference in interests and working conditions. Livengood's interests are more closely tied to management than to hourly workers, and his interests are different from those of production and maintenance employees. I find that Livengood does not share sufficient common interest in wages, hours, and other conditions of employment with production and maintenance employees to be included in the same collective-bargaining unit.

Kathy Claypool. Kathy Claypool is the wife of Benjamin Claypool, Respondent's production or plant manager. CEO Bazzano, who is her direct supervisor, stated that she is a salaried employee. She is the office coordinator, and she is also in charge of shipping and receiving, and purchasing for the Company. She appears on Dlubak Corporation's payroll in department 500, office personnel. Her purchasing responsibility is to purchase all materials that are needed to keep the Company running on a day-to-day basis. She has an office in the area of plant 1 where the executive offices are located. She has occasion to go out onto the production floor in connection with performing her shipping and receiving duties; however, she normally wears dresses and high-heel shoes, rather than work clothing such as is worn by production employees. She coordinates timely shipment of products with trucking companies and the loading dock.

Kathy Claypool stated that she has been employed by Dlubak Corporation for 6 years, and that she currently holds the job titles of purchasing and shipping agent, and office coordinator. She purchases all materials needed to run the plant. She has purchasing authority without approval up to $300. She estimated that she spends 30 to 35 percent of her time in the performance of her purchasing duties. In the performance of her duties as shipping agent, she coordinates all shipping from the aluminum and glass divisions. She prepares all the necessary paperwork, calls trucking companies to schedule shipments, and delivers shipping papers to the loading dock, either in person or by having someone from the shipping docks pick up the papers. She coordinates with the aluminum customer service representative, Barbara Fratta, and the glass customer service representative, Nancy Noroski, in scheduling shipments. She estimated that she spends 50 percent of her time in the performance of her shipping duties. She has held the job of office coordinator since October 1988. She is responsible for ensuring that office clerical personnel are available to handle office work, and on occasion will fill in for absent office personnel. She schedules vacations and time off for office clerical personnel, and handles their gripes and complaints. She has monthly planning meeting with the office personnel. She estimated that she spends 15 percent of her time on office coordinating the work of office personnel. She admitted that she spends 95 percent of her time in the office, and that she dresses for work in dresses and high-heel shoes.

On these facts, I find that Kathy Claypool has a combination of clerical and managerial responsibilities. She has an office in the area of the plant where the Company's business offices are located, and she is directly supervised by the chief executive officer of the Company. She seldom has occasion to go out onto the production floor, and does not dress appropriately to work in that area of the plant. She performs clerical functions in purchasing supplies and materials needed for the day-to-day operation of the plant, and in coordinating and scheduling shipping and preparing the necessary paperwork, such as bills of lading, but, in performing those functions she also exercises a substantial degree independent judgment. Her responsibilities as office coordinator are managerial in nature, but they also include filling in for absent office clerical employees.

I find that there are substantial differences between her interest in wages hours, and working conditions, compared to those of production and maintenance employees. As a salaried employee, she enjoys substantially higher pay and benefits compared to hourly personnel. She does not work in the area of the plant devoted to production, and is not supervised by production supervisors. In fact, she has little day-to-day contact with production personnel. Unlike production personnel, she does not work rotating shifts or punch a timeclock. Her job functions have no similarity to those of production employees. When her employment is evaluated by the factors set out by the Board in *Kalamazoo Paper Box Corp*., supra, it is quite apparent that she does not share a sufficient community of interest with production and maintenance employees to be grouped with them in a collective-bargaining unit. Therefore, she should be excluded from bargaining unit, and she was not eligible to vote in the election of January 12, 1989.

Wilfred Ruppersberger. Wilfred Ruppersberger has been employed by the Dlubak Corporation for 5 years. He has held the job title of supervisor for approximately 3 years. He was promoted to supervisor while working at the West Kittanning plant (plant 2), at a time when Dlubak Corporation operated three shifts a day there. Dan Porter, now the glass division supervisor, was in charge of plant 2, and Ruppersberger was his assistant. Prior to being promoted to assistant supervisor, and later to supervisor, he was a crew chief. He changed from an hourly to a salaried employee when promoted to assistant supervisor. Since then, Dan Porter was transferred to plant 1 and Respondent reduced production and the number of employees at plant 2, but it remained Ruppersberger's place of duty during the the July 1988 to March 1989 period. There is no indication that his place of duty or job has changed since then. His job during that period was to make difficult specialty bends which could not be done on the production floor at plant 1. During the period from October 1988 through March 1989, an average

of two to three employees were assigned to work under Ruppersberger's supervision at plant 2, and he had authority to give them directions. Since January 1989, Robert Fox has been assigned on a regular basis to be Ruppersberger helper at plant 2. During the period from November 1988 to January 1989, Fred White, who also has the job title of ''supervisor,'' worked at plant 2 on a specialty project. Five employees who worked at plant 2 at various times testified that they received directions from Ruppersberger, and regarded him as their supervisor.

Ruppersberger reports to Dan Porter or Ben Claypool. He usually receives job assignments through Dan Porter, who either gives him the job folders or tells him to pick them up at the main plant. He completes the paperwork reflecting how much time he and his helper spends on each job, and turns it in to Glenn Livengood. He does not regularly sign employee timecards, but on several occasions he has initialed employee timecards to show that the employees had arrived at plant 2 on time.

CEO David Bazzano stated that Ruppersberger works the day shift, for the most part, and spends the majority of his time doing production work. Ruppersberger parks his private vehicle at plant 1, in the parking area used by management and clerical employees. He drives to plant 2 in a company vehicle, usually hauling glass, and opens and closes the facility each day. Other employees working with Ruppersberger at plant 2 do not have keys to the facility. Ruppersberger has had one to five employees assigned to him, and he assigns work to his helpers. Bazzano stated that he never discussed Ruppersberger's duties with him.

During the November 1988 to March 1989 period, Ruppersberger did not have the authority to hire, fire, or discipline employees. He did not have the authority to grant employees overtime, leaves of absence, or vacations. He does not have the authority to recommend personnel actions, including promotions, transfers, layoffs, recalls, or rewards. However, he is clearly considered by management to be in charge of the Kittanning production facility, and he has the authority to send employees home for misconduct, and to report misconduct to management for disciplinary action.

It is clear from the evidence that Ruppersberger was in charge of plant 2 during the November 1988 to March 1989 period. He had the title of supervisor, and other Dlubak Corporation employees assigned to plant 2, usually on a temporary basis, regarded him as their supervisor. It was his responsibility to direct the work of employees assigned to him, and to keep the required records of jobs and time spent by him and his helpers in completing the jobs. He reported to Ben Claypool and Dan Porter, who plainly held him responsible for work performed at plant 2.

Regardless of whether or not Ruppersberger had sufficient authority to make him a statutory supervisor, as defined in Section 2(11) of the Act, he had the authority to direct employees in their work, send employees home for misconduct, and to report misconduct to senior management for disciplinary action. As a salaried employee, there were substantial differences in his wages, hours, and other conditions of employment compared to those of production and maintenance workers.

Ruppersberger, as a salaried employee with some supervisory responsibilities, clearly did not share a common interest in wages, hours, and other conditions of employment with production and maintenance employees. While he performed production work, the conditions under which he worked differ greatly from the wages, hours, and other working conditions of production and maintenance employees.

Because Ruppersberger's interests and working conditions differed substantially from those of the Respondent's production and maintenance employees, I find that he did not share a sufficient community of interest with production and maintenance employees to be included with them in a collective-bargaining unit. Therefore, he was not eligible to vote in the election of January 12, 1989.

Barbara Fratta. Barbara Fratta has been employed by Dlubak Corporation for over 10 years, for the last 5 to 6 years as the Company's customer service representative for the aluminum division. Her duties have not changed in the past 2 years. Payroll change notices pertaining to her, issued by the Company in September 1988 and April 1989, contain the entry, ''office'' in the block titled ''Department.'' She works daylight hours, 8:30 a.m. to 5:00 p.m. She is a salaried employee, earning $520 per week, considerably more than earned by hourly workers, including several of the crew chiefs, who were paid $9.50 an hour. She shares an office in the ''front office'' area with Nancy Noroski.[87] She normally wears a dress and high-heel shoes to work. She estimated that she spends 90 percent of her time in her office, and 10 percent in the aluminum shop. She normally eats in the lunchroom near the office area. Her supervisor is CEO David Bazzano. She does not supervise any other employees. As customer service representative, she had occasion to travel to customers' places of business with the Company's vice president for sales.

Barbara Fratta testified that she has worked in many aspects of Dlubak Corporation's operations. She started out cleaning the shop, and then learned stained glass operations and aluminum frame fabrication. Following a layoff, she worked in the Company's office, where she took care of accounts receivable, and performed shipping and purchasing functions. She also prepared bids for mailing to customers, completing drawings where necessary. She did aluminum and glass estimating, and prepared production folders. She stated that 5 to 6 years ago, the Company's growth required one person for each of those jobs, and she started her present job.

As customer service representative, she prepares production or job folders for each aluminum division job. The folders, which are for use by aluminum division production personnel, contain purchase orders, drawings, patterns, estimate information, instructions, quantities, and bending specifications. She keeps track of the customer's materials, after they arrive, so that the materials can be matched to the job. Once she has prepared the production or job folders, and production has started, she follows the progress of the job by keeping in contact with the crew chief or the person in charge of setting up the job. On occasion, she goes to the production area, but more frequently production personnel come to her office, or talk to her by telephone. She ascertains from production and inspection personnel how long the job will take, and determines a shipping date. She follows the progress of

[87] Prior to early 1988, Barbara Fratta's office was in the aluminum bending division area. She stated that it was dirty and cold, and the floors were greasy and slippery, so she wore rubber-soled shoes, jeans, and a sweater or sweatshirt.

jobs to make sure they are completed within the allotted time. She has authority to give orders concerning scheduling of jobs, or to direct that unsatisfactory work be done over. Production personnel notify her if there are problems with a job, and, if necessary she contacts the customer in order to resolve problems. She examines doubtful bends, and decides if they will be acceptable to the customer. If she cannot make the decision, she gets help from higher management. She talks by telephone to customers, keeping them informed about progress and completion dates.

Barbara Fratta denied that she supervises production personnel, or that she performs the duties of the receptionist or the accounting clerk. During the period from July 1988 to March 1989, she went to the production floor to inventory materials on hand. She admitted that when going down to the production floor to perform an inventory or check a bend, she may have taken job folders with her. She acknowledged that she sometimes performs shipping duties for Cathy Claypool. She sometimes performs estimating duties for special customers. Her correspondence is typed by Kathy Kasparek. She admitted that in November 1988, in a letter she prepared for the NLRB, she called herself the production coordinator for the aluminum division, but, she stated that is not her official job title. She called herself production coordinator,[88] she testified, because she is the only person who has the responsibility of keeping track of purchase orders from start to finish.

From July 1988 to March 1989, Barbara Fratta determined the order of jobs by their shipping dates, sometimes giving particular jobs priority. She sometimes assigned work to Jeff Snyder, who has particular skill in making elliptical bends. She kept a record of the number of bends required for each job, using figures contained in production folders, and furnished that information to Ben Claypool or David Bazzano.

While she did not directly supervise production personnel, it is apparent that she closely followed the progress of aluminum bending jobs, and exercised considerable discretion in moving the job along and determining whether the product produced was suitable for shipment. She had discretion to inspect work, and send it back if she concluded it did not meet the customer's specifications. She did not, however, inspect each piece in a job, but only those which production personnel brought to her attention because of a problem. CEO Bazzano said that during the July 1988 to March 1989 period, crew chiefs directed their questions about work to Fratta and Ben Claypool. Benjamin Claypool, the Company's production manager, said that he told Crew Chief Steven Meleason that in his absence, he must follow Fratta's directions concerning rush jobs.

During that period, she had authority to approve time off requests from aluminum division employees, if there was no conflict. If there was a conflict because more than one employee wanted a particular time off, she referred the matter to CEO Bazzano. She also checked the mathematics on time sheets which another employee, Jim Mitchell, prepared from employees' timecards, and if she found the mathematics to be correct, initialled the timesheets. She had the authority to send them back to Mitchell for correction of errors. She denies that she had authority to initial individual employee timecards. She stated that she prepared overtime schedules which were posted in the work areas. She denied, however, she makes decisions concerning when employees are scheduled to work. Such decisions were made by Ben Claypool. She did not decide which shift a particular employee would work, nor did she make the decision when overtime was needed. However, because of her knowledge of the workload in the aluminum division at any given time, her recommendations concerning overtime scheduling seem to have been routinely followed. While she may not have had the authority to make decisions concerning scheduling of crews and work, she made recommendations concerning such matters to CEO Bazzano, which he generally accepted.

She also submitted payroll changes for employees who were due 6-month pay increases. She did not exercise any personal discretion in determining when to submit requests.[89] Decisions concerning pay were made by CEO Bazzano. On several occasions she has been asked by CEO Bazzano for her opinion concerning the qualifications of certain employees to be crew chiefs.[90]

During the same period, Fratta attended production meetings between crew chiefs and management. Attending for management were David Bazzano, Brian Henry, and Dave Passarelli. She stated that she attended only meetings at which the crew chiefs were present.[91]

On the evidence of record, I conclude that Barbara Fratta is not a supervisor, within the meaning of Section 2(11) of the Act, but neither does she share a sufficient community of interest with the Company's production and maintenance employees to be included with them in a collective-bargaining unit. While she exercises some of the functions of a supervisor, she is not responsible for day-to-day supervision of aluminum division production and maintenance employees. She exercises considerable discretion in connection with scheduling of production orders, including assignment of priority, and she has similar broad discretion in the area of quality control. However, she spends little of her time on the production floor, 10 percent by her estimate, and she does not direct the day-to-day work of production employees. Her involvement in production problems arises only when production personnel bring problems to her attention.

She has routinely recommended scheduling of overtime when the workload demands, and on occasion she has made recommendations concerning the status of certain employees; however, she does not have authority to take action in either area on her own. Moreover, performance of the latter function appears to be isolated, and not a routine part of her duties. Further, while she been delegated authority to authorize

[88] Ralph DeRose, whose job title was operations coordinator, left the Company's employ on December 31, 1987. Benjamin Claypool took over the aluminum department in April 1988. During the interim, Barbara Fratta scheduled work and crews.

[89] CEO Bazzano stated that it is company policy to review each employee every 6 months for a payraise, until they reach a certain level of pay and are reviewed annually. He stated that Barbara Fratta filled out a form for each employee and brought it to his attention when the employee was due for evaluation. He stated that she did not exercise any personal discretion in filling out the form.

[90] She was asked about the qualifications of Jim Mitchell to be a foreman in the aluminum division, and whether the shop foreman, Ron Vantine was qualified for his job. In both instances she gave favorable opinions.

[91] The crew chiefs at that time were Steve Meleason, Jeff Snyder, and Jim Mitchell.

time off for employees, her authority is limited to those instances in which there is no conflict arising from other employees requesting the same time off.

Fratta lacks the authority to hire, transfer, suspend, lay off, recall, promote, discharge, reward, or discipline aluminum division employees. She has no authority to adjust their grievances. Her authority to assign and direct employees is limited, and, in the absence of any other indicia of supervisory authority, is insufficient to constitute her a supervisor within the meaning of Section 2(11) of the Act.

Remaining are the questions of whether Barbara Fratta is an office clerical employee, a class of employees excluded from the bargaining unit, or even if she is not, does she have sufficient community of interest to be included the collective-bargaining unit composed of the the Company's production and maintenance employees? Analysis of her duties discloses the existence of substantial differences in interests and working conditions compared to production and maintenance employees. She is a salaried employee, the production and maintenance employees are hourly employees. Apart from the difference in how salaried and hourly employees' wages are computed, salaried employees of the Company enjoy significantly better benefits, and a steadier, fixed income, with substantially less chance of being laid off. As a salaried employee, her hours of work are constant and do not change according to a rotating shift schedule. She does not punch a timeclock. She is supervised by the chief executive officer of the Company, not by the supervisors of the hourly production and maintenance workers. She spends the majority of her time (90 percent) in an office in the office area of the plant, where she has little contact with production employees, and little of her time (10 percent) in the production areas of the plant where production and maintenance employees work. She customarily does not eat her lunch in the same lunchroom used by production employees. She dresses for work in street clothing, not work clothes. She does not perform production work, and her duties are distinctly different from those of production and maintenance employees. Unlike production and maintenance employees, she has substantial contact with the Company's customers, and many of her duties, such as scheduling production and shipment of orders, preparing shipping documents, taking inventory of supplies, ordering replacement materials and supplies, and putting together production folders are more analogous to clerical duties than to production duties.

Because she has substantially different interests and working conditions, I find that she lacks sufficient community of interest to be included in the bargaining unit composed of the Company's production and maintenance employees. In view of this finding, it is immaterial whether her duties fall precisely in the category of an office clerical employee, or involve other areas of responsibility which are not clerical in nature. Her duties, interests, and working conditions differ substantially from those of the Company's production and maintenance employees, and, for that reason, she is excluded from the bargaining unit, and was not entitled to vote in the January 1989 election.

Nancy Noroski. Nancy Noroski is the Respondent's customer service representative for the glass division. Her job title is customer service, glass division. She has been employed by Respondent for 11 years. Like Barbara Fratta, with whom she shares an office, and who is her counterpart for the aluminum division, Nancy Noroski began her employment as a production worker, with experience in etching glass and fabricating metal frames. Before taking on the position of customer service representative, which she has held for 4 years, she was in the etching department, where her duties included estimating and doing glass etching work.

All work in the glass division is custom work, no standard items are produced and stocked. Nancy Noroski receives purchase orders, and prepares production sheets which are used in producing the orders. When customers supply patterns, she goes over the patterns with Keith Shaffer, the Company's pattern maker. After conferring with him, she prepares production sheets, which she faxes to the customer for his approval. After the customer approves, she prepares job folders in which she places sizes, drawings and diagrams, and any other information which is needed or useful to production workers who bend the glass. She makes six copies of each job folder, and delivers them to Dan Porter or Glenn Livengood, who distribute the copies to the different glass departments involved in production and shipment of the finished product. She does not determine the order in which jobs are produced; however, when orders come in she determines whether the job can be produced and shipped in time to meet the customer's lead time. If it cannot be, she relays that information to the customer. Jobs are usually scheduled on a first-come first-served basis, but at times CEO Bazzano makes exceptions to that policy, and directs her to move up lead times for special jobs. She answers questions about the job from the glass table, the glass benders, the laminating department, and the boxing department. She keeps informed about the progress of each job, through contact with Dan Porter, a glass division supervisor who monitors each job as it is produced. During production of the job, she contacts the customer if problems arise. Occasionally she goes to the production floor to look at defects, then contacts the customer to find out if he will accept the glass. When the job is completed, she coordinates shipment of the finished product. She answers calls from customers requesting information on the status of their order and shipping dates. She obtains the number of boxes or crates needed to ship the product, together with weights and sizes, and passes that information to Kathy Claypool, who makes the shipping arrangements.

Her supervisor is CEO David Bazzano. She gives job folders to Bazzano before they go to production. Bazzano determines if the glass needed for the job is in-house, and, if not, orders it. She is salaried. Her work hours are from 8:30 a.m. to 5 p.m. She does not do production work,[92] but she does have occasion to go to the production area to check on problems encountered in completing jobs. She estimates that she spends 95 percent of her time in the office area of the plant, and 75 percent in the office she shares with Barbara Fratta. She dresses for work in street-type clothes. She attends meetings conducted by Kathy Claypool, as the office coordinator. She does not routinely attend production meetings with CEO Bazzano. She occasionally meets with customers, either when they come to the Respondent's plant, or at their place of business. She does not do typing or filing. Her office, which she shares with Barbara Fratta, is on the second floor

[92] Using her experience in etching and sandblasting glass, she occasionally shows production employees how to etch glass and mask glass for sandblasting and engraving.

of the main office complex. She normally eats lunch in the lunchroom in the office area.[93]

It is apparent that Nancy Noroski is not a supervisor, within the meaning of Section 2(11) of the Act. However, for much the same reasons that Barbara Fratta, whose duties are in many respects analogous to those of Nancy Noroski, does not share a sufficient community of interest with production and maintenance employees to be included with them in the bargaining unit, neither does Nancy Noroski. Nancy Noroski is a salaried employee, and enjoys substantially better benefits than hourly employees. She does not do production work, nor is she supervised by production supervisors. She does not work rotating shifts. She has infrequent contact with production and maintenance employees. She prepares job folders, but does not set job priorities or production schedules. While she does not perform typical clerical duties, such as typing and filing, neither do the duties that she performs bear any resemblance to production duties. Accordingly, I find that she should be excluded from the bargaining unit, and was not eligible to vote in the January 1989 election.

Conclusion. Based on the evidence of record, I find that there were 71 employees in the bargaining unit on December 27, 1988, and on January 12, 1989, who were eligible to vote in the election held that day.[94] The 71 employees who made up the bargaining unit include the 66 employees named in General Counsel's Exhibit 55 whose membership is not disputed, plus employees William Plunkard, Thomas Ellenberger, Timothy A. Shirley, Gary S. Slee, and Joseph Visnovsky.

The parties agree that between the election and March 14, 1989, the size of the bargaining unit increased by two new employees: Cynthia Nayman Smith, hired on January 23, 1989, and, Douglas A. Hankey, hired on February 6, 1989. Adding these employees to the bargaining unit increases its size, as of February 6, 1989, to 73 employees. There was no change in the composition and size of the unit between that date and March 14, 1989, the postelection date by which the General Counsel contends that the Union had increased by six the number of employees who had designated the Union as their collective-bargaining representative.

IV.

a. *Challenged authorization cards*. The Charging Party Union first notified the Respondent that it claimed to represent a majority of the Company's production and maintenance employees by mailgram, dated October 12, 1988. By letter of October 21, 1988, addressed to Frank Dlubak, the Union asserted that it represented a majority of the production and maintenance employees at the Company's Freeport, Pennsylvania plant (plant 1), and requested that the Company recognize the Union, following a verification of signed authorization cards by a third party. The Respondent's attorney, Alex E. Echard, Esq., by letter of October 27, 1988, informed the Union that the Dlubak Corporation declined and refused ''to recognize the ABGW Union as a bargaining agent for any of its employees.'' By letter of February 22, 1989, the Union notified the Respondent that it represented ''a majority of all full-time and regular part-time production and maintenance employees employed by Dlubak Corporation at its Freeport, PA facilities.'' The Union offered to prove its majority status by submitting signed union authorization cards from a majority of the employees in the unit to a neutral party for verification. By letter of March 1, 1989, the Respondent's attorney, Alex E. Echard, informed the Union that Dlubak Corporation disputed that the Union represented a majority of all full-time and regular part-time production and maintenance employees.

The General Counsel alleges that as of November 20, 1988, the Union had attained majority status, that is, it had obtained signed union authorization cards from a majority of Respondent's employees who made up the appropriate unit. If that position fails, the General Counsel contends that majority status was achieved by March 14, 1989. The Respondent disputes that the Union attained majority status by November 20, 1988, or by January 12, 1988, the date of the election. If the Union attained majority status at any time, it was not until March 1989, and the Respondent argues that authorization cards obtained by the Union after the January 12, 1989 election should not be counted as evidence of majority status in support of a *Gissel* bargaining order.

To prove the Union's majority status, the General Counsel offered in evidence 45 signed union authorization cards. Of the 45 cards, 37 are dated on or before November 7, 1988. The remaining eight were obtained after the election, between on or about February 20 and March 14, 1989. Following is a list of signed authorization cards, and the date appearing on each card:

Robert L. Bowser	September 30, 1988
Kevin M. Dosch	September 30, 1988
Mark R. Gorog	September 30, 1988
Mark A. Kijowski	September 30, 1988
Nicholas J. Kuchta	September 30, 1988
Brian D. Smith	September 30, 1988
Gregg S. Crissman	October 3, 1988
Stephen D. Meleason	October 3, 1988
William Plunkard	October 3, 1988
Jeffrey W. Copeland	October 4, 1988
Randy Lee Johns	October 4, 1988
Glenn S. Ross	October 4, 1988
Randy L. Ross	October 4, 1988
Jeffrey S. Snyder	October 4, 1988
Frank D. Cushey	October 5, 1988
Douglas J. Leipertz	October 5, 1988
Bruce A. Offredi	October 5, 1988
David C. Plunkard	October 6, 1988
Robert K. Fox	October 8, 1988
Rena L. Bellotti	October 9, 1988
Dirk A. Fennell	October 9, 1988
Bradley N. Kuhn	October 9, 1988
Phyllis Lubiniecki	October 9, 1988
Todd A. Placek	October 9, 1988

[93] There are lunchrooms in the glass and aluminum production areas of the plant which production employees normally use. It does not appear that the Respondent has rules concerning where employees may eat their lunch. Where employees eat their lunch appears to be more a matter of convenience and habit than a matter of whether the employees are production, maintenance, office, or management employees.

[94] There were 73 employees in the bargaining unit on November 20, 1988. The size of the bargaining unit decreased to 72 on December 21, 1988, when Gloria J. Young's employment ended, and to 71 on December 27, 1988, when Georgia A. Shernock's employment ended.

Jimmy D. Walker	October 9, 1988
Arthur Brendlinger	October 10, 1988
Francis K. Righi	October 10, 1988
Donald Lee Emery	October 10, 1988
John J. Milligan	October 10, 1988
Kathy Ann Milligan	October 10, 1988
Tracy D. Reuter	October 12, 1988
Janet L. Toy	October 12, 1988
David A. Crotallo	October 15, 1988
Kirk A. Bauer	November 6, 1988
James F. Cravener	November 7, 1988
John A. Osche	November 7, 1988
Thomas P. Shankle	November 7, 1988
Kenneth W. Bowser	February 20, 1989
Richard J. Charney	February 20, 1989
Timothy A. Shirley	March 2, 1989
James S. Hudek	March 3, 1989
Gary C. Slee[95]	March 12, 1989
C. J. (Tina) Goodgasell	March 13, 1989
Gary H. Heigley	March 14, 1989
John J. Valasek, III	March 14, 1989

Respondent challenges the validity of 5 of the 37 authorization cards obtained by the Union by November 7, 1989. Challenged are the authorization cards of William Plunkard (October 3, 1988), Francis K. Righi (October 10, 1988), Donald L. Emery (October 10, 1988), Kathy Ann Milligan (October 10, 1988), and Janet Toy (October 12, 1988). Respondent also contends that the missing card of Gary C. Slee, allegedly signed on November 12, 1988, is invalid, and should not be counted in determining whether or not the Union attained majority status. Respondent contends that as of November 20, 1988, there were 79 employees in the bargaining unit, including those challenged by the General Counsel and the Union,[96] but not including William Plunkard, who is challenged by the Respondent. Therefore, only 32 of the 37 authorization cards (or 38, if Slee's lost card is considered) claimed by the Union are valid, and that number fell short of the 40 cards the Union needed to have a majority. By January 12, 1989, the number of employees in the bargaining unit, as calculated by Respondent, had fallen to 76 employees,[97] but even if all 36 of the Union's signed cards are valid,[98] the Union still lacked the 39 cards needed for a majority.

Respondent further disputes that the Union attained majority status by March 14, 1989, through the addition of eight signed cards it obtained after the January 12, 1989 election. Respondent asserts that the size of the bargaining unit increased by the addition of 2 new employees, 1 hired on January 23, 1989, and and the other on February 6, 1989,[99] raising the membership of the bargaining unit to 78 employees. Respondent challenges the validity of 6 of the 45 cards claimed by the Union by March 14, 1989: William Plunkard (October 3, 1988), Francis K. Righi (October 10, 1988), Donald L. Emery (October 10, 1988), Kathy Ann Milligan (October 10, 1988), Janet Toy (October 12, 1988), and John Valacek (March 14, 1989). Excluding these 6 cards, Respondent concludes, the Union had only 39 signed authorization cards by March 14, 1989, a number which falls 1 card short of the 40 needed by the Union for a majority. In any event, the Respondent's argument continues, even if the Union obtained a majority by March 14, 1989, that is irrelevant under the complaint, because for purposes of determining whether a *Gissel* bargaining order is appropriate under the complaint, the crucial date when the Union must have represented a majority of the appropriate bargaining unit is by January 12, 1989, the date of the election.

I have considered Respondent's challenges to the authorization cards of William Plunkard, Francis K. Righi, Donald L. Emery, Kathy Ann Milligan, Janet Toy, John Valacek, and Gary C. Slee (the Respondent challenges only the lost card Gary Slee is alleged to have signed on or about November 12, 1988), and I find that none of the challenges are meritorious.

William Plunkard. Respondent challenges Plunkard's card because he was lawfully discharged on October 6, 1988. For reasons previously discussed at length, I have found that Respondent's action in discharging Plunkard on or about October 6, 1988, was unlawful and constituted an unfair labor practice in violation of Section 8(a)(1) of the Act. In view of that finding, his union authorization card signed on October 3, 1988, is valid, and will be counted in determining whether the Union attained support of a majority of the bargaining unit at any time relevant to the complaint.

Francis K. Righi, Donald L. Emery, and Kathleen Ann Milligan. Respondent contends that these three employees revoked their signed union authorization cards prior to the date upon which the Union sought majority status, and, even though they were unsuccessful in their efforts to regain possession of their cards, the Union may not count their cards among the cards of employees it claims to represent. Respondent argues that Righi, Emery, and Milligan revoked their signed union authorization cards soon after they signed them, and before they were subjected to alleged unfair labor practice conduct by the Company.

Righi testified that he signed a union authorization card at his home during the evening of October 10, 1988, and gave the signed authorization card to Brion Smith and Nicholas Kuchta, who were there to solicit his signature and had fur-

[95] Gary C. Slee testified that he signed a union authorization card at a union meeting held 2 months before the election, but ''they threw it out because I was part-time and they did not want to cause me any trouble.'' Slee said that he signed another authorization card on March 12, 1989, at Bob Bowser's house. John E. Shinn testified that he received a signed union authorization card from Slee at a union meeting on November 12, 1988. He told Slee that he was not going to turn in the card, because Slee was ''only a casual,'' and he felt that the company was ''capable of letting him go.'' He stated that he gave the card to a secretary at the Union's regional office, and she misplaced it. The General Counsel argues that if Slee is counted as a member of the bargaining unit, his lost card should also be counted.

[96] Timothy Ballas, Kathy Claypool, Barbara Fratta, Glenn Livengood, Nancy Noroski, Wilfred Ruppersberger, Thomas Ellenberger, Timothy Shirley, Gary Slee, and Joseph Visnovsky.

[97] Three employees terminated their employment between November 20 and December 27, 1988: Nicholas Relich (November 20, 1988), Georgia Young (December 21, 1988), and Gloria Shernock (December 27, 1988). That, Respondent argues, reduced the size of the bargaining unit from 79 to 76 employees.

[98] The Respondent continues to maintain that William Plunkard's card is not valid, because he was terminated for cause in October 1988, and that Gary Slee's lost card should not be counted.

[99] Cynthia Nayman, hired on January 23, 1989, and Douglas Hankey, hired on February 6, 1989.

nished the card. Righi stated that later that evening he changed his mind, and the next day asked Smith to return the card which he had signed. He said that Smith responded that would not be a problem, but he no longer had the card in his possession, and would have to get it back. Smith did not subsequently return the card to Righi, and Righi acknowledged that he did not write to the Union asking for return of his card. Righi stated that he is a crew leader in the boxing department, and that in October 1988, he rented the house in which he lived from Frank Dlubak. He said that he may have told another employee that if the Union came in, the employees would lose all of their overtime. He denied that anyone from the Company told him that.

Emery testified that Brion Smith and Nicholas Kuchta came to his home during the evening of October 10, 1988, and solicited his signature on a union authorization card. Emery testified that he signed the union authorization card given to him by one of them, and handed it back. Emery said he later changed his mind about the card, and the next day, when Mark Kijowski asked him to sign a union authorization card, he told Kijowski that he had already signed one, and wanted it back. Kijowski told him that was no problem, but Emery never got his card back. He acknowledged that he never requested return of his card in writing to the Union.

Kathleen Ann Milligan testified that she was visited at her home by Kevin Dosch and Mark Kijowski during the evening of October 10, 1988, and they asked her to sign a union authorization card. She said that she signed a card which they provided, and returned it to them. She said that she acted vindictively in signing the card, and changed her mind the next day. Several days later, she asked Dosch to return her card. He said that he would try to get it back, but she did not subsequently hear anything further from him about her card. Two weeks after she signed the card, she received a telephone call from Kijowski, during which he asked her if she was still with them. She replied that she was not, and after Kijowski asked why, she replied that Frank Dlubak had told her that he would close the plant down if the Union came in.

Brion Smith testified that he had discussions with Righi and Emery about the need for a union before they signed the union authorization cards. He said he told them that his reason for wanting a union was job security, and that he used himself as an example of the need for security. Smith had been laid off by the Company on October 7, 1988. Smith denied that Righi later asked him for return of his card, or that Righi said that Emery wanted his card back.

Kevin Dosch denied that Kathleen Ann Milligan asked him to return her card. Dosch said that his first conversation with Kathleen Milligan about signing a union authorization card took place on October 9, 1988. He told her that a union was needed because of the layoffs which had occurred. He gave her a card, but she did not sign until he came back the next evening with Mark Kijowski.

Nicholas Kuchta denied that either Righi or Emery asked for return of their signed union authorization cards. Kuchta acknowledged, however, that he heard rumor that they wanted their cards back.

Mark Kijowski said that he was not aware that Kathleen Milligan asked Dosch to return her card.

An employer may attack the validity of authorization cards which a union relies upon to establish majority status by showing that the cards were revoked prior to the union's demand for recognition. *Reilly Tar & Chemical Corp. v. NLRB*, 352 F.2d 913 (7th Cir. 1965); *J. P. Stevens & Co.*, 244 NLRB 407 (1979); *TMT Trailer Ferry*, 152 NLRB 1495 (1965). The Board has not accepted revocations, however, which are the product of the employer's unfair labor practices. *Quality Markets*, 160 NLRB 44 (1966). See also *Struthers-Dunn, Inc.*, 228 NLRB 49 (1977), enforcement denied 574 F.2d 796 (3d Cir. 1978), in which the Board held that cards revoked prior to the commission of any unfair labor practices did not count toward establishing a union majority necessary to support a bargaining order.

Two issues are presented here. First, did the three card signers, or any one or more of them, revoke or attempt to revoke the union authorization cards which they had signed; and, second, if they did revoke or attempt to revoke their signed union authorization cards, was the revocation the product of unfair labor practices committed by the Respondent.

Whatever Righi, Emery, and Kathleen Milligan may have intended, it is clear that if they took any steps at all to revoke their union authorization cards, they were half-hearted and ineffectual steps. Accepting their testimony at face value, each of them did no more than make an oral request for the return of their card. They did not follow up with other requests, and they made no effort to contact the Union directly, either orally or in writing, to ask that their cards be returned. Under these circumstances, with knowledge that the employees who solicited the cards no longer had them, their failure to take any further steps to demand return of or revoke their cards was tantamount to acquiescence in use of their cards by the Union.

The testimony of Righi, Emery, and Kathleen Milligan cannot be reconciled with that of Dosch, Smith, Kijowski, and Kuchta on the revocation issue. Considering Kuchta's testimony that he had heard a rumor that Emery and Righi wanted their cards back, I conclude that however half-hearted and ineffectual their attempts may have been, Righi, Emery, and Kathleen Milligan may, indeed, have let it be known to someone at some time that they wanted their cards back.

That leaves the question of what weight should be given to the attempts they say that they made to regain possession of their cards. The three card signers testified in this proceeding as witnesses for the Respondent, at a time when the Union had failed to achieve a majority vote in the election and the Respondent could reasonably be perceived as having gained the upper hand. In the face of the retaliatory action already taken by the Respondent, it is hardly surprising that employees would seek to minimize their support for the Union and give testimony damaging to the Union.[100]

As noted, the Board has held that revocations of union authorization cards will not be accepted if they are product of an employer's unfair labor practices. Such is the case here. I have already entered findings that the discharge of William

[100] In *NLRB v. Gissel Packing Co.*, 395 U.S. at 608, the Supreme Court said:

> [W]e also accept the observation that employees are more likely than not, many months after a card drive and in response to questions by company counsel, to give testimony damaging to the union, particularly where company officials have previously threatened reprisals for union activity in violation of Sec. 8(a)(1).

P. Plunkard on October 6, 1988, and the layoff of seven other employees on October 7, 1988, including the four employees who had solicited union authorization cards from Righi, Emery, and Kathleen Milligan, were violations of the Act. It was no mere coincidence that seven of the eight employees whose employment was summarily terminated had, within the preceding week, surfaced as active union organizers. Rather, the Respondent clearly took reprisals against those employees which it could identify as union supporters, with the intent of stopping their union organizing activities, and intimidating its employees into rejecting the Union's organizing drive, by forcefully making the point that support of the Union would cost them their jobs. In the case of Righi, Emery, and Kathleen Milligan, it is evident that Respondent succeeded.

Even assuming that Righi, Emery, and Kathleen Milligan made some attempt to revoke their union authorization cards, I find that those attempts, coming as they did hard on the heels of their decisions to sign the cards in the first place, were the product of Respondent's unfair labor practices, and, therefore, the revocations have no validity, and the Union is entitled to have their cards counted in determining if it gained majority status.

Janet Toy. Respondent challenges the validity of the union authorization card signed by Janet Toy on October 12, 1988, because she was told that the reason for signing was ''just to get the representative to come in and talk to us about the union.'' Further, she was told by Robert Bowser, the employee who solicited her signature, that the ''card would be kept 'secret' and would be 'burnt' after they got enough cards 'for the union representative to come in and talk to us.'''

Robert Bowser testified that he solicited Janet Toy's signature in October 1988. He said that he placed a telephone call to her at her home, during which he asked her if she would like to sign a union authorization card. She was concerned about confidentiality, and replied she would think about it. He called her again, and she said she would sign. After that, at his home, he gave her a card; she looked at it, signed it, and gave it back. He said he told her the card would be strictly confidential. He denied that he told her that the sole purpose of the card was to get a union representative to talk to the employees. He said he did not tell her that he would destroy the card after the union representative came. Bowser said that Janet Toy attended one union meeting.

Janet Toy said that Bowser had called her four or five times asking her to sign a card. She said that she asked him what she was signing. After he said the card was to get a union representative to come and talk to the employees, she agreed to sign, and arranged to stop at his home. She said she trusted Bowser because she had known him for 30 years. She said he told her to read the card, and she skimmed over it, signed the card, and left it on a table. She said she did not know that she was agreeing that the Union would be her collective-bargaining agent. She said that Bowser told her that no one except the National Labor Relations Board would know she had signed the card, and that the card would be destroyed.

The union authorization card which Janet Toy, and the other Dlubak employees signed, is an unambiguous single-purpose card which clearly designates the Union as the employee's collective-bargaining representative. The card says nothing about it being used for any other purpose. In *NLRB v. Gissel Packing Co*., 395 U.S. at 584, the Supreme Court, noting that the approach of the Board in dealing with allegations of misrepresentation by the union and misunderstanding by the employee of the purpose for which cards are solicited has been set out in *Cumberland Shoe Corp*., 144 NLRB 1268 (1963), said that,

> Under the *Cumberland Shoe* doctrine, if the card itself is unambiguous (i.e., states on its face that the signer authorizes the Union to represent the employee for collective bargaining purposes and not to seek an election), it will be counted unless it is proved that the employee was told that the card was to be used solely for the purpose of obtaining an election.

In approving the Board's *Cumberland* rule, as it applies to unambiguous single-purpose cards, the Supreme Court said,[101]

> employees should be bound by the clear language of what they sign unless that language is deliberately and clearly canceled by a union adherent with words calculated to direct the signer to disregard and forget the language above his signature. There is nothing inconsistent in handing an employee a card that says that the signer authorizes the union to represent him and then telling him that the card will probably be used first to get an election. . . . We cannot agree with the employers here that employees as a rule are too unsophisticated to be bound by what they sign unless expressly told that their act of signing represents something else.

Evidence that card signers were told that the card would be used to get a representative to come to talk to the employees about a union, among other things, has been found insufficient to invalidate unambiguous cards. *Peerless, Inc. v. NLRB*, 484 F.2d 1108 (7th Cir. 1973); *NLRB v. WKRG-TV, Inc*., 470 F.2d 1302 (5th Cir. 1973); *Bookland, Inc*., 221 NLRB 35 (1975). It is not enough that a card signer may have been under the impression that the card would be used for some other purpose than representation, where the employee read and understood the card before signing it and the card unambiguously designated the union as the collective-bargaining representative with the company. *Horizon Air Services*, 272 NLRB 243 (1984), enfd. 761 F.2d 22 (1st Cir. 1985). Cards will not be invalidated unless the solicitor told the employee that the sole purpose of the card was something other than stated on the face of the card.

In this case, I find from the evidence that card solicitor Bowser did not intentionally set out to deceive Janet Toy as to the card's purpose, even if she may have been misled as to its purpose. According to Janet Toy's own testimony, Bowser told her to read the card before she signed it. Considering the plain and unambiguous language of the card, that advice is hardly consistent with an intent upon Bowser's part to deceive her. That Janet Toy may have disregarded his sound advice and signed something she did not bother to read is not only a lame excuse, it is an unconvincing one

[101] 395 U.S. at 606–607. Later on, the Supreme Court reiterated that nothing it said indicates its approval of the *Cumberland Shoe* rule when applied to ambiguous dual-purpose cards. 395 U.S. at 609.

which hardly rises to the level of misrepresentation needed to invalid an unambiguous card which clearly designates the union as collective-bargaining representative.[102] Neither does it invalidate her card that she may have been told her card would be kept confidential. That she feared disclosure of her support for the union merely reflects the success of the Respondent in intimidating its employees by its reprisals against other employees engaging in union activities.

I find that Janet Toy's union authorization card is valid.

John Valacek. Citing *NLRB v. Savair Mfg. Co*., 414 U.S. 270 (1973), Respondent challenges John Valacek's union authorization card on the grounds that he was offered an economic inducement to sign the card, in the form of a representation that his union dues would be paid by signing the card. The General Counsel counters that the testimony of Art Brendlinger, the card solicitor, in which he denied saying anything about union dues or initiation fees, should be credited over Valacek's testimony as a witness called by Respondent, particularly since Valacek's testimony contradicted his affidavit given 2 weeks after he signed the card.

John Valacek identified the card which he signed on March 14, 1989. He said that he signed the card on the same day it was given to him in the company parking lot by Art Brendlinger. In contradictory testimony, Valacek, who was called as a witness by Respondent, variously said that Brendlinger told him his dues would be paid if he signed the card, then that it happened so long ago he did not remember exactly what was said. Valacek acknowledged that in an affidavit he gave to a Board agent, he said Brendlinger did not say anything about union dues or initiation fees.

I do not credit Valacek's contradictory testimony, particularly in light of his affidavit. I find no credible evidence that he was induced to sign a union authorization card by a representation that his dues would be paid by signing the card. There is, in fact, no evidence that payment of dues was an issue with any of the employees. I find no evidence of misrepresentation or financial inducement by the Union through its solicitor which would invalidate Valacek's card.

I find that Valacek's card is valid.

Gary C. Slee. The General Counsel argues that for purposes of determining whether or not the Union had majority status in the bargaining unit by November 20, 1988, Gary C. Slee should be counted among those who had signed a union authorization card, even though the Union has since lost the card.[103] The Respondent challenges use of evidence of the missing card as evidence of employee support for the Union in determining if the Union attained majority status.[104]

Gary Slee testified that he signed a union authorization card at a union meeting some 2 months prior to the election, but, he said, the Union threw it out because he was a part-time employee and they did not want to cause him any trouble. Union Representative John Shinn testified that Gary Slee handed him a signed union authorization card at a union meeting on November 12, 1988. Shinn testified that he told Slee that he would take the card, but that he would not turn it in because a hearing to set up the election had already been scheduled. Shinn said that he felt the Company was capable of letting Slee go. He said he gave the card to a temporary secretary working for the Union at that time and she was supposed to file it. He said he is unable to find the card in the Union's file, and concludes that it was misplaced.

Respondent argues that the record does not establish that Slee signed a valid authorization card in November 1988, and, even assuming, arguendo, that he did, the Union's act of rejecting it precludes it from claiming it accepted the card and represented Slee. Respondent states that it was incumbent upon the Union to notify Slee that his authorization was accepted. The Union's failure to do so precluded the possibility that Slee might have decided to revoke his card. In the absence of the actual card, it is mere speculation that Slee signed the same card as the others.

The Board has not limited the method of determining if a union obtained majority status. In *Printer Bros*., 227 NLRB 921, 922 (1977), the Board said that a combination of signed cards by nonvoters added to secret ballots cast for the union constituted ''valid expressions of employee sentiment.'' In this case, where the issue is whether the Union attained majority status for purposes of issuance of a bargaining order, that determination may be made upon proof of employees' support for the Union in the form of signed authorization cards, and other reliable evidence that employees had selected the Union as their collective-bargaining agent.

I find the testimony of Union Representative Shinn and employee Slee to be credible. The evidence does not disclose that the Union used any type of authorization card in its organizational campaign other than the type signed by other employees and admitted into evidence. There is no reason to believe that the card purportedly signed Slee differed in any way. While Union Representative Shinn may have indicated to Slee that he did not intend to use Slee's card at that time, he accepted the card from Slee, without in any way rejecting Slee's support for the Union. It is clear from the attendant circumstances that Slee intended to designate the Union as his collective-bargaining agent, and the Union was aware of that fact, and did not reject Slee's designation.

The evidence that Slee signed a union authorization card on November 12, 1988, is sufficiently strong to support a finding that he executed a valid single-purpose authorization card appointing the Union to be his collective-bargaining agent. He should be included in any computation of whether or not the Union had attained a majority after November 12, 1988.

b. *Union majority*. The appropriate bargaining unit was composed of 71 employees as of December 27, 1988, and on January 12, 1989, the date of the election. By February 6, 1989, the size of the unit had increased to 73 by the addition of 2 newly hired employees. That figure remained unchanged through March 14, 1989, the alternate date upon which the General Counsel contends that a union majority was established.

I find that the Union attained majority status on November 20, 1988, and retained majority status on January 12, 1989, the day of the election. The increase in the size of the unit

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[102] Further weakening Janet Toy's testimony is the observation by the Supreme Court in *NLRB v. Gissel Packing Co*., 395 U.S. at 608, that employees are more likely than not to give damaging testimony against a union where many months have passed and the company engaged in reprisals against employees for their union activities.

[103] *Hedstrom Co*., 223 NLRB 1409 (1976), enfd. in pertinent part 558 F.2d 1137 (3d Cir. 1977).

[104] Respondent does not dispute that Slee signed another union authorization card on March 12, 1989, but it does dispute that cards obtained by the Union after the election can be used to determine if the Union had majority status in the bargaining group.

from 71 to 73 during January and February 1989, resulting from the addition of 2 newly hired employees, did not change the Union's majority status, since at 73 members, the Union, with 37 signed authorization cards, still enjoyed a 37 to 36 employee advantage. Thus, the Union's actions in obtaining eight more signed authorization cards by March 14, 1989, the alternate date upon the Union claims majority status merely increased the size of its majority.

The General Counsel has produced 37 valid employee union authorization cards signed on or before November 7, 1988. The bargaining unit at that time was composed of 74 employees, including 3 employees who subsequently terminated their employment prior to the January 12, 1989 election. Thus, counting only the 37 signed cards which the General Counsel actually produced and introduced in evidence, on November 7, 1988, the employees in the bargaining unit were evenly split between support for the Union and uncommitted status. If Gary Slee's missing card, which was allegedly signed on November 12, 1988, is counted, as I have found that it properly should be, the Union had the support of 38 of the employees in the 74-person unit, and had attained majority status.

On November 20, 1988, the date on which Nicholas Relich's employment ended, the size of the bargaining unit decreased to 73 employees. With 37 signed authorization cards, not counting Gary Slee's missing card, to 36 employees who did not sign cards, the Union had majority status. If Slee's missing card is counted, the margin of the Union's majority increases to two employees. The size of the unit dropped from 73 to 71 by late December, with 2 more employees terminating their employment, and did not change again before election. Therefore, the Union had majority status on the day of the election.

Between February 20 and March 14, 1989, the Union collected another 8 signed union authorization cards, bringing the total number of signed authorization cards collected by the Union to 45. Included in that number is an authorization card signed by Gary Slee on March 12, 1989, but not his missing card which he is alleged to have signed and turned over to the Union on November 12, 1988. All eight of these cards are valid. The 45 authorization cards obtained by the Union on or before March 14, 1989, accounts for more than half of the bargaining unit, which had 73 members at that time. Therefore, I find that the Union had majority status on March 14, 1989.

V.

Challenged ballots. A total of 74 votes were cast in the election held on January 12, 1989. Of that number, 33 votes were cast for the Union, and 33 votes were cast against the Union. The remaining eight ballots were challenged and remain unopened. The Union challenged the ballots of Timothy Ballas, Wilfred Ruppersberger, Kathy Claypool, Nancy Noroski, and Barbara Fratta. Respondent challenged the ballots of Mark Livengood, Richard Anthony, and William Plunkard. At the hearing, the parties stipulated that the employment of Mark Livengood and Richard Anthony was terminated before the election, and, that the challenges to their ballots should be sustained and their ballots should not be opened. Remaining are six challenged ballots. The challenges are sufficient in number to affect the results of the election.

The Respondent's challenge to the ballot of William Plunkard is overruled. The Respondent committed an unfair labor practice in violation of the Act by terminating Plunkard's employment on October 6, 1988, because he engaged in union activity. He is entitled to reinstatement to his former position and backpay. Therefore, I find that he was a member in good standing of the bargaining unit at the time of the election, and was entitled to vote. His ballot shall be opened and counted.

The challenges of the Union and the General Counsel to the ballots of Timothy Ballas, Wilfred Ruppersberger, Kathy Claypool, Nancy Noroski, and Barbara Fratta are sustained. For reasons previously stated, these five employees of Respondent were not members of the appropriate bargaining unit, and, therefore, were ineligible to vote in the election of January 12, 1989. Therefore, their ballots shall not be opened or counted.

In accordance with the parties' stipulation, the challenges to the ballots of Mark Livengood and Richard Anthony are sustained. Their ballots shall not be opened or counted.

VI.

The Respondent virtually conceded in its brief that in light of the numerous incidents of 8(a)(1) violations alleged, and particularly the unrebutted testimony concerning statements made by Frank Dlubak during the critical period before the election, the election should be set aside. Respondent stated that it would make no further argument against setting the election aside. The issue which Respondent vigorously contests is whether a bargaining order is appropriate.

Because of the numerous violations of Section 8(a)(1), (3), and (5) of the Act which I have found that Respondent's top management committed over a period of roughly 3-1/2 months before the election, I entirely agree with Respondent's observation, that ''it is extremely unlikely that the election will not be set aside.'' In light of the numerous unfair labor practices, including a variety of ''hallmark violations,'' committed by Respondent's top management during the critical period of the union organizational campaign prior to the election, and afterwards, the results of the election cannot stand. However, I further find that setting aside the election and relying upon the Board's traditional remedies is inadequate in this case, because it is impossible to hold a fair rerun election in light of Respondent's ''outrageous'' and ''pervasive'' violations of the Act. Issuance of a bargaining is fully appropriate in the circumstances of this case.

If the revised tally of ballots, after opening and counting the ballot of William Plunkard, shows that the Union won the election, the Union is entitled to a certification of representative, and a bargaining order. *Eddyleon Chocolate Co*., supra, 301 NLRB at 892.[105] If, however, the revised tally of ballots shows that the Union did not receive a majority of the valid ballots cast, I recommend that a bargaining order be issued, and that the election be set aside and the petition dismissed. *Eddyleon Chocolate Co*, supra.

[105] In *Eddyleon Chocolate Co*., supra, the Board said:

> In the event that a final revised tally of ballots shows that the Union won the election, we conclude, in agreement with the judge, that the Union is entitled to a certification of representative, but in addition to our bargaining order.

The Board will issue a bargaining order, even if the union lost the election,[106] in cases in which the employer committed ''outrageous'' and ''pervasive'' unfair labor practices, which make the holding of a fair election impossible, or, in cases which are ''marked by less pervasive practices which nonetheless still have the tendency to undermine majority strength and impede the election process.'' *NLRB v. Gissel Packing Co*., supra, 295 U.S. at 613–614. In *Kona 60 Minute Photo*, 277 NLRB 867, 870 (1985), the Board set out the criteria for issuance of a bargaining order:

> In determining whether a bargaining order is warranted to remedy the Respondent's misconduct in this case, we apply the test set out in *NLRB v. Gissel Packing Co*., 395 U.S. 575 (1969). There the Court identified two categories of cases in which a bargaining order would be appropriate. The first involves ''exceptional cases'' marked by unfair labor practices which are so ''outrageous'' and ''pervasive'' that a fair election is rendered impossible. The second category involves ''less extraordinary cases marked by less pervasive practices which nonetheless still have the tendency to undermine majority strength and impede the election process.'' The Supreme Court stated that in the latter situation a bargaining order should issue where the Board finds that ''the possibility of erasing the effects of past practices and ensuring a fair election . . . by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards would, on balance be better protected by a bargaining order.''

Although the Supreme Court, in *NLRB v. Gissel Packing Co*., supra, 395 U.S. at 613–614, indicated that an inquiry into majority status might possibly be unnecessary in ''exceptional cases'' involving ''outrageous'' and ''pervasive'' unfair labor practices, the Board, in *Gourmet Foods*, 270 NLRB 578, 587 (1984), stated that it did ''not believe we would ever be justified in granting a nonmajority bargaining order.''

In this case, the Union attained majority status on November 20, 1988,[107] and retained its majority status on the day of the election, January 12, 1989, and afterwards. After the election, the Union's majority was reduced, but not lost entirely, by the addition to the bargaining unit of two new employees hired in January and February 1989. By March 14, 1989, the Union had obtained eight more signed authorization cards from bargaining unit members, and increased its majority in the process. Respondent objects that postelection authorization cards cannot be used to establish the Union's majority status for purposes of a bargaining order, particularly, where, as here, the Respondent contends that a Board agent counseled union supporters that obtaining more cards might help their case.[108]

Although the Board has said that it will not issue bargaining orders in nonmajority cases, *Gourmet Foods*, supra, it has not specified any particular cutoff time by which a union must attain majority status for purposes of a bargaining order. What is required is ''reliable poof of some sort that a majority of employees in a union, at some relevant time in some recognized form, asserted their choice and selected and designated a union as their representative.'' *Gourmet Foods*, supra, 270 NLRB at 586.

In this case, the election resulted in a tie vote, with the outcome dependent upon rulings on challenged ballots and objections to the election. As noted above, even the Respondent concedes that the election likely will be set aside, and thus, in effect, concedes that the election did not resolve the issue of whether or not the Union shall be the bargaining agent for the employees in the appropriate unit. In these circumstances, the Union's organizational drive did not end with the election, it continues until this case is resolved. In that context, the relevant period of time for the purpose of establishing majority status logically continues past the election to the time when the Board decides whether or not to issue a bargaining order. In the interim, there is no compelling reason why the Union should not be at liberty to try to increase its representation of bargaining unit employees.

[106] In *NTA Graphics*, 303 NLRB 801 (1991), the Board said that in cases in which the union lost the election, it would issue a bargaining order under appropriate circumstances, only if the election is set aside on the basis of meritorious objections. In the instant case, the Union filed objections to the election, which I have found to be meritorious.

[107] The Board also has refused to issue a bargaining order unless the election is set aside on the basis of meritorious objections. *NTA Graphics*, supra. In this case, the Union filed timely objections to the election, some of which I have found to be meritorious.

[108] There is no evidence in this record indicating that Board Agent Ronald Kisak breached any duty of neutrality in connection with the election in this case, as condemned in *Hudson Aviation Services*, 288 NLRB 270 (1988), and other cases cited by Respondent. The alleged conduct of Board Agent Kisak, referred to in Respondent's brief as evidence that he allied himself with the Union, in fact took place after the election, not before the election or while it was taking place. Employee Mark Kijowski, whose testimony I have found otherwise credible, testified that sometime in February 1989, but in any event after the election, Board Agent Kisak said that he was going after a bargaining order. He told Kijowski that the numbers were close, and, in response to Kijowski's question of whether it was possible or would be helpful to get more cards, replied in the affirmative. Kijowski said that after that conversation he solicited six to eight more cards, and that while he was doing that, Kisak asked him from time to time if he had any more cards. Field Examiner Kisak's stipulated expected testimony is that in or about February 1989, he had a conversation with Mark Kijowski, in which he advised Kijowski that based upon payroll records he had obtained from Dlubak Corporation, pursuant to the investigation of pending charges, it appeared that the issue of the Union's majority was a close question. Even assuming that the conversations involving Board Agent Kisak, as related by Kijowski and set out in the stipulation of Kisak's expected testimony, occurred as described, they took place at a time after the election had already taken place, and while Kisak was apparently involved in investigating the objections to the election and pending charges. This case, therefore, is distinguishable on its facts from *Hudson Aviation Services*, supra, in which an election was set aside because a Board agent's conduct while an election was in progress ''undermined the indispensable perception of Board neutrality in the election.'' 288 NLRB at 870. Whatever Board Agent Kisak may have said or done, it could have had no impact on an election which had taken place a month before. Further, it does not appear that Kijowski referred to Kisak's alleged remarks in soliciting signed authorization cards from fellow employees. Thus, there is no evidence that the card signers were influenced in signing the authorization cards by anything reportedly said by Board Agent Kisak. Even assuming that Board Agent Kisak's statements to employee Kijowski were in error, it was a harmless error.

Postelection union authorization cards are a reliable means of determining whether or not the Union has attained majority status for purposes of issuance of a bargaining order. Accordingly, I find that the eight postelection authorization cards obtained by the union may be counted in determining whether or not the Union attained majority status for purposes of a bargaining order. But, while I find that the postelection authorization cards may be counted, there is no necessity for doing so in this case, because, as stated above, the Union attained majority status by November 20, 1988, and retained it through March 14, 1989, without counting the postelection authorization cards, and regardless of whether or not Gary Slee's missing authorization card signed in November 1988 is counted.

''In determining whether a bargaining order is appropriate, the Board examines the seriousness of the violations committed and the present effects of the coercive practices.'' *Churchill's Supermarkets*, supra, 285 NLRB at 142. In that case, the Board agreed that a bargaining order was appropriate, even though 7 years had passed since the employer's unfair labor practices, because the employer's conduct was ''extensive and pervasive,'' and involved ''hallmark'' violations, including threatening plant closure and discharging an employee because of his union activity, as well as other violations, all of which occurred within a 5-week period and involved top management. The Board said:[109]

> The serious nature of the Respondent's conduct in threatening plant closure, soliciting grievances, and discharging a union supporter, however, convinces us that the lasting effect of such conduct cannot be remedied either by the passage of time or the Board's traditional remedies.

In explaining why the Board's traditional remedies would not be adequate, the Board said:[110]

> These actions involve the type of pervasive coercion that has lingering effects not readily dispelled. Because of the swiftness and severity of the Respondent's reaction against the Union's organizing drive, it is highly unlikely that a fair election could be conducted with the use of only traditional remedies. We note that the Sixth Circuit has recognized that a cease-and-desist order is not always sufficient to remedy an employer's unfair labor practices. *Exchange Bank v. NLRB*, 732 F.2d 60 (6th Cir. 1984).

In *Kona 60 Minute Photo*, supra, the employer's comanager and a general partner unlawfully interrogated employees, threatened to discharge employees because of their union activity, and threatened that selection of a union would be an exercise in futility because the employer would refuse any union bargaining request. The Board, in approving issuance of a bargaining order, found that the unfair labor practices of the employer fell at least into the second category of cases in which a bargaining order would be appropriate. Of the persistent effects of such actions by the employer and the need for a bargaining order, the Board said:[111]

> It is clear that the Respondent's unlawful conduct struck at the very core of the employees' organizational efforts. Its conduct involved such violations as repeated threats of discharge for union activity. Threats of this nature have a profound impact on employees. These threats were also widely disseminated. The seriousness of the Respondent's conduct is further underscored by the small size of the unit and the high level of management officials involved. Taken as a whole, the Respondent's acts involve the type of severe and pervasive coercion which has lingering effects not readily dispelled.
>
> In light of the violations found herein, we conclude that the possibility of erasing the effects of the Respondent's unfair labor practices and of conducting a fair election by the use of traditional remedies is slight. Requiring the Respondent simply to refrain from such conduct will not eradicate the lingering effects of the violations. Correspondingly, an election would not reliably reflect genuine, uncoerced employee sentiment. Thus, we conclude that the employees' representation desires expressed through authorization cards would, on balance, be protected better by our issuance of a bargaining order than by traditional remedies. Furthermore, although there has been some turnover in the unit and a significant passage of time since the violations occurred, in light of circumstances of the violations and their impact on the entire unit, to withhold a bargaining order here would, in effect, reward the Respondent for his own wrongdoing.

A similar conclusion was reached by the Board in *Impact Industries*, supra, 285 NLRB at 6, in which it said that:

> When the organizing campaign surfaced, the Respondent immediately embarked on an antiunion campaign designed to discourage its employees from supporting the Union and engaged in numerous violations of the Act in its effort. These include interrogations; threats of plant closure, discharge . . . [and] the impression of surveillance . . . .

In light of those violations (and others), the Board concluded that:

> [T]he possibility of erasing the effects of the Respondent's unfair labor practices and conducting a fair election by the use of traditional remedies is slight. Requiring the Respondent simply to refrain from such conduct will not eradicate the lingering effects of the violations. Correspondingly, an election would not reliably reflect genuine, uncoerced employee sentiment. Given the swiftness with which the Respondent reacted to the organizational effort and the postelection violations, the likelihood of the Respondent again engaging in illegal conduct is clearly present. We conclude that the employees' representation desires expressed here through authorization cards would, on balance, be better protected by our issuance of a bargaining order than by traditional remedies. Although there has been some turnover in the unit, and a significant passage of time since the violations occurred, in light of the circumstances of this case, particularly the seriousness of

[109] 285 NLRB at 143.
[110] 285 NLRB at 142.
[111] 277 NLRB at 870–871.

> the violations and their impact on the entire unit, to withhold a bargaining order here would reward the Respondent for its own wrongdoing.

In its decision in *Eddyleon Chocolate Co*., supra, a recent case which bears many similarities to the instant case, the Board granted a bargaining order where ''the record revealed a veritable catalog of unfair labor practices,''[112] including plant closure, threats to layoff or discharge union supporters, coercive interrogation of employees, creating the impression of surveillance of union activity, granting promised benefits, and ordering a mass discharge in retaliation for union activities, among others. Of these unfair labor practices, the Board said they included ''numerous examples of what we term 'hallmark violations,' including some of the most pernicious—plant closure and layoff threats and discriminatory discharge and layoffs.''[113] The Board described such violations in the following terms:[114]

> These are the most flagrant forms of interference with Section 7 rights and are more likely to destroy election conditions for a longer period of time than are other unfair labor practices because they tend to reinforce employees' fear that they will lose employment if union activity persists. All the violations were committed by individuals at the top of the management hierarchy—the majority by its president.

Noting that there was also evidence of postelection violations of the Act, the Board described the ''likelihood of the Respondent's misconduct recurring in a rerun election'' as high, and the ''possibility of erasing the lingering effects of the Respondent's unfair labor practices and of ensuring a fair election by traditional remedies'' as slight.[115]

The instant case involves many of the same ''catalog of unfair labor practices,'' including some of the ''most pernicious'' ''hallmark violations,'' for example, ''plant closure and layoff threats and discriminatory discharge and layoffs,'' as the Board found warranted a bargaining order in *Eddyleon Chocolate Co*., supra.

The General Counsel has established by a preponderance of the evidence, that from the first week of October 1988, to the election held on January 12, 1989, the Respondent committed multiple incidents of a wide variety of unfair labor practices, including disparaging employees because of support for the Union, threatening plant closure if the employees selected the Union as their bargaining representative, threatening employees with discharge or layoff because of their union activities, coercively interrogating employees about their union activities and the union activities of other employees, threatening that bargaining would start at zero if the employees selected the Union as their bargaining representative, threatening unspecified reprisals against employees because of their union activities, laying off employees because of their union activities, refusing to recall employees on layoff because of their union activities, creating the impression of surveillance of the union activities of employees, restricting the movement of employees within the plant because of their union activities, paying bonuses of $500 and $50 to employees in order to discourage support for the Union, and threatening the inevitability of a strike if the employees selected the Union as their bargaining representative. The Respondent also committed unfair labor practices by discharging an employee because of his union activities, transferring an employee because of her union activities, issuing a written warning to an employee because of his union activities, and refusing to bargain with the union as the collective-bargaining representative of a majority of the employees in the appropriate bargaining unit. It is hardly an overstatement to characterize Respondent's misconduct in this case as ''a veritable catalog of unfair labor practices.''

The unfair labor practices involved Respondent's top management, originating with its president and owner, down through the chief executive officer, the plant manager, and a supervisor in the glass division. The Respondent's reaction to learning that its employees had embarked on a union organizing effort was to swiftly implement a heavy-handed multifaceted antiunion campaign. The tone of the Company's campaign against the Union was set by its owner and president, whose antiunion statements were widely disseminated throughout the bargaining unit. He threatened that if the employees selected a union to represent them he would close the plant and move his business elsewhere. He disparaged union supporters, threatened union supporters' jobs, coercively interrogated employees about their union activities and the union activities of other employees, and created the impression that he had their union activities under surveillance.

When the president and owner of a small, privately held corporation goes out of his way to make his opposition to a union known to his employees, and threatens their jobs in various ways if they select a union as their bargaining representative, it is not surprising that lower levels of management, who are also dependent upon the Company for their employment, would take such threats seriously. In fact, the plant manager and the glass division supervisor, perceiving a threat to their employment, picked up on the themes announced by the Company's president and owner, and amplified it by threats and predictions of dire consequences of their own. The Respondent's activities, however, did not stop with threats and predictions. In a transparent attempt to intimidate its employees into rejecting a union, Respondent, in actions apparently approved by the highest levels of management, fired one employee and laid off a number of others in retaliation for their union activities. And, in the course of its efforts to discourage employees from selection a union as their bargaining representative, Respondent committed numerous other unfair labor practices.

As in *Eddyleon Chocolate Co*., supra, *Somerset Welding & Steel*, supra, and *Impact Industries*, supra, the Respondent in the instant case committed ''hallmark violations,'' including threats of plant closure, layoff threats, and discharges, which threatened the employees' livelihood, and are likely to have a lasting impact which cannot be easily erased by time or the Board's usual remedies. No less than in those cases, a bargaining order is necessary in the instant case ''to effectuate

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[112] 301 NLRB at 891.

[113] 301 NLRB at 891. See also *Somerset Welding & Steel*, 304 NLRB 32, 34 (1991), in which the Board said that threats of plant closure are not only '''hallmark' violations but are 'among the most flagrant' of unfair labor practices.'' The Board said that violations which ''threaten the very livelihood of employees, are likely to have a lasting impact which is not easily erased by the mere passage of time or the Board's usual remedies.''

[114] Supra at 891.

[115] Supra at 892.

the employees' sentiment, as expressed in the Union's valid card majority, in favor of representation.''[116]

The Respondent's hostility towards the Union continues unabated, and its postelection conduct made it quite apparent to its employees that it believes that it has gained the upper hand. The Respondent, here, has practically invited a new election. Clearly, a new election is one which the Respondent expects to win. There is no indication that Respondent has communicated any withdrawal of its ''hallmark violations'' to its employees, much less that it has given any indication to its employees that it is willing to abide by the results of a free and fair election. Nothing has occurred in this case to attenuate the chilling impact of threats by its top management to close the plant if the employees select a union as their bargaining representative and its intent to retaliate against employees who engage in union organizing activities by discharge and layoff, particularly where, as here, the discharged employee has not been rehired and two of the principal union supporters have not been recalled from their retaliatory layoff.

This case clearly falls into the first category of cases warranting issuance of a bargaining order, identified by the Supreme Court in *NLRB v. Gissel Packing Co*., supra, as those exceptional cases marked by unfair labor practices which are so outrageous and pervasive that a fair election is rendered impossible.

CONCLUSIONS OF LAW

1. Respondent Dlubak Corporation is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union, Aluminum, Brick and Glass Workers International Union, AFL–CIO–CLC, is a labor organization within the meaning of Section 2(5) of the Act.

3. By disparaging employees who joined supported and/or assisted the Union; threatening employees with plant closure if they chose the Union as their collective-bargaining representative; coercively interrogating employees about their union activities and the union activities of other employees; threatening employees that bargaining would begin at zero if they chose a union as their collective-bargaining representative; issuing a notice restricting the movement of employees within the plant because of their union activities; threatening employees with discharge or layoff, or with other unspecified reprisals because of their union activities; threatening that employees on layoff would not be recalled because of their union activities; threatening employees with inevitability of strikes if they chose a union as their collective-bargaining representative; and, creating the impression among employees that their union activities were under surveillance, Respondent violated Section 8(a)(1) of the Act.

4. By discharging employee William Plunkard because of his union activities; by laying off employees Brion Smith, Mark Kijowski, Kevin Dosch, Nick Kuchta, Jeffrey Copeland, Ron Vantine, and Mark Gorog because they engaged in union activities; by failing and refusing to recall its employees Brion Smith and Kevin Dosch, and by failing and refusing to recall its employee Mark Kijowski until January 14, 1989, all because of their union activities; by granting a $500 bonus to its employees in order to discourage them from choosing a union and engaging in union activities; and, by giving a written warning to its employee Bruce Offredi, Respondent violated Section 8(a)(1) and (3) of the Act.

5. By giving its employees a $50 bonus after the election; by transferring employee Tracy Reuter from its Freeport facility to its Kittanning facility, because of her union activities; by refusing to recognize or bargain with the Union, as the exclusive bargaining representative of the appropriate unit on matters relating to wages, hours, and other terms and conditions of employment which are mandatory subjects for the purpose of collective bargaining, Respondent violated Section 8(a)(1), (3), and (5) of the Act.

6. Since November 14, 1988, the Union has been the exclusive bargaining agent, within the meaning of Section 9(a) of the Act, representing a majority of the employees in the following appropriate unit:

> All full-time and regular part-time production and maintenance employees employed by the Respondent at its Freeport, Pennsylvania, and Kittanning, Pennsylvania, facilities; excluding casual employees, office clerical employees and guards, professional employees and supervisors as defined in the Act.

7. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in unfair labor practices in violation of Section 8(a)(1), (3), and (5) of the Act, I recommend that the Respondent be ordered to cease and desist, and to take certain affirmative action designed to effectuate the purposes of the Act. I further find that the widespread and egregious violations of the Act by Respondent evidence a general disregard of its employees' statutory rights, and, therefore, a broad injunctive order is warranted. *Family Foods*, 300 NLRB 649 (1990).

Respondent, having committed certain unfair labor practices in violation of Section 8(a)(1), (3), and (5) of the Act, shall be ordered to cease and desist from engaging in these unfair labor practices.

Respondent, having discriminatorily terminated the employment of William Plunkard, and discriminatorily laid off Brion Smith, Mark Kijowski, Kevin Dosch, Nick Kuchta, Jeffrey Copeland, Ron Vantine, and Mark Gorog, shall be ordered to offer full and immediate reinstatement to each, and pay them backpay and interest, to be computed in the manner prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), and *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[117]

Having found that a bargaining order is appropriate, Respondent, on request, shall bargain collectively with the Union as the exclusive bargaining representative of employees in the following appropriate unit:

[116] *Somerset Welding & Steel*, supra.

[117] In accordance with our decision in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), interest on and after January 1, 1987, shall be computed at the ''short-term Federal rate'' for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621. Interest on amounts accrued prior to January 1, 1987 (the effective date of the 1986 amendment to 26 U.S.C. § 6621), shall be computed in accordance with *Florida Steel Corp*., 231 NLRB 651 (1977).

> All full-time and regular part-time production and maintenance employees employed by the Respondent at its Freeport, Pennsylvania, and Kittanning, Pennsylvania facilities; excluding casual employees, office clerical employees and guards, professional employees and supervisors as defined in the Act.

In the event a bargaining order takes effect without a certification of representative, for reasons set forth in this decision, the election held in Case 6–RC–10106 shall be set aside.

Nothing in this Order shall authorize or require that Respondent rescind bonuses that have been conferred.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[118]

ORDER

The Respondent, Dlubak Corporation, Freeport, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Creating the impression of surveillance of its employees' union activities.

(b) Granting employees bonuses, without first bargaining with the Union as their exclusive representative for collective-bargaining purposes, or, for the purpose of discouraging employees from supporting the Union.

(c) Interrogating employees about their own union activities and those of other employees.

(d) Threatening employees with a reduction in benefits, discharge, layoff, closure of the Respondent's plants, and other unspecified reprisals if the employees select a union as their collective-bargaining representative, or because they engage in union activities.

(e) Laying off employees because of their union activities.

(f) Discharging employees because of their union activities.

(g) Threatening employees that bargaining will begin at zero if they select a union as their collective-bargaining representative.

(h) Refusing to recall employees on layoff, because of their union activities.

(i) Restricting movement of employees within the plant because of their union activities.

(j) Transferring employees because of their union activities.

(k) Threatening employees with the inevitability of strikes if they choose a union as their exclusive representative for collective-bargaining purposes.

(l) Issuing written warnings to employees because of their union activities.

(m) Refusing to bargain collectively with the Union as the exclusive bargaining representative of the employees in the appropriate unit.

(n) In any other manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer William Plunkard, Brion Smith, Mark Kijowski, Kevin Dosch, Nick Kuchta, Jeffrey Copeland, Ron Vantine, and Mark Gorog, immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for for any loss of earnings or other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy.

(b) Remove from its files any reference to the unlawful discharge of William Plunkard, the unlawful layoff of Brion Smith, Mark Kijowski, Kevin Dosch, Jeffrey Copeland, Ron Vantine, and Mark Gorog, the unlawful written warning issued to Bruce Offredi, and the unlawful transfer of Tracy Reuter, and notify them in writing that this has been done and that the discharge, layoffs, warning, and transfer will not be used against them in any way.

(c) On request, bargaining with the Aluminum, Brick and Glass Workers International Union, AFL–CIO–CLC, as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time production and maintenance employees employed by the Respondent at its Freeport, Pennsylvania, and Kittanning, Pennsylvania facilities; excluding casual employees, office clerical employees and guards, professional employees and supervisors as defined in the Act.

(d) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Post at its Freeport, Pennsylvania, and Kittanning, Pennsylvania facilities copies of the attached notice marked ''Appendix.''[119] Copies of the notice, on forms provided by the Regional Director for Region 6, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

IT IS FURTHER ORDERED that the challenge to the ballot of William Plunkard be overruled; that the challenges to the ballots of Timothy Ballas, W. F. Ruppersberger, Kathy Claypool, Nancy Noroski, and Barbara Fratta be sustained; and, that the challenges to the ballots of Mark Livengood and Richard Anthony be sustained by agreement of the parties.

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[118] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[119] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

IT IS FURTHER ORDERED that Case 6–RC–10106 be severed from Cases 6–CA–21319, 6–CA–21538, 6–CA–21570, and that it be remanded to the Regional Director for Region 6 for action consistent with the Direction below.

DIRECTION

IT IS DIRECTED that the Regional Director for Region 6 shall, within 10 days from the date of this decision, open and count the ballot of William Plunkard, and that he prepare and serve on the parties a revised tally.

If the revised tally in this proceeding reveals that the Union has received a majority of the valid ballots cast, the Regional Director shall issue a certification of representative. If, however, the revised tally shows that the Union has not received a majority of the ballots cast, the Regional Director shall set aside the election.